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82-738

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____.

DR. ETHEL D. MIGRA,

Petitioner

-vs-

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit

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Counsel for Petitioner.

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Of Counsel.

QUESTIONS PRESENTED

1. Where the only issue judicially acted upon and decided by a state court involved the breach of a teacher's employment contract, is the prevailing teacher precluded from instituting a civil rights suit in the federal court under 42 U.S.C., Sections 1983 and 1985, against the Board of Education and its members--state court defendants?

2. Where a teacher is terminated without a hearing in violation of the contract of employment, under circumstances implicating her good name, reputation, honor or integrity, does the federal court have jurisdiction of a civil rights action to vindicate the teacher's liberty and property interests as secured to her by the Fourteenth Amendment?

3. Whether parties to a state court action could raise the defense of res judicata or collateral estoppel in a civil rights suit involving federal claims that were not raised and did not arise in the earlier action, although they could have been submitted and litigated under the concurrent jurisdiction of the state court?

PARTIES TO PROCEEDING

The parties to this proceeding are those contained in the caption of the case, to wit: Dr. Ethel D. Migra, The Warren City School District Board of Education, Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim, Barbara Miller, and Robert Peques.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

DR. ETHEL D. MIGRA,
Petitioner,

-vs-

THE WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are unreported and appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 3, 1982. A petition for rehearing en banc was denied on

July 27, 1982 and this petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First and Fourteenth Amendments to the Constitution, and Title 42 U.S.C., Sections 1983 and 1985 -- all appear in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner, Dr. Ethel D. Migra, instituted a civil rights action in the district court to vindicate the deprivation of her constitutional rights under the First and Fourteenth Amendments to the Constitution pursuant to Sections 1983 and 1985 of Title 42 of the United States Code and the jurisdictional counterpart, 28 U.S.C., Sections 1331(a) and 1343(3). The suit was filed against the respondents -- the Warren City School District Board of Education and individual members of that board, along with the superintendent of the school district.

The genesis of the instant suit was the unlawful actions and conduct, under color of law, of the respondents which resulted in the

termination of the employment of the petitioner as a supervisor of elementary education in the subject school district.

Petitioner was employed by the Warren City School District Board of Education (hereinafter board) as supervisor of elementary education on a yearly basis from August, 1976, until the events which gave rise to this action. On April 17, 1979, at the regular meeting of the board, with all members present, a unanimous resolution was adopted to renew the employment of the petitioner for the school year 1979-1980. One week later, on April 24, 1979, the board held a special meeting at which it rescinded the resolution to renew the petitioner's contract of employment by majority vote with one member absent. As a result of the board's action, the petitioner brought suit in the State court against the respondents -- the board and individual members thereof, who voted to non-renew the petitioner. The State court complaint asserted two causes of action against, 1) the board for the breach of the contract of employment, and 2) the individual board members for wrongful interference with the renewal of petitioner's contract of employment. In the prayer the petitioner sought declaratory relief, the award of compensatory damages equal to the salary she would have earned during the school

year of 1979-1980 and the summer session of 1979, and punitive damages.

At the trial on the merits, the State court sua sponte continued the tort claim against the individual defendants (respondents), and adjudicated only the contract issue between the petitioner and the board. Thereupon, the court held that petitioner had a valid contract of employment with the board for the school year of 1979-1980, and that the respondents' action to revoke the contract was contrary to law. The court ordered the petitioner reinstated and awarded her compensatory damages to the extent of the salary which she would have earned for the subject year. The petitioner had not been paid (compensated) until shortly before the filing of this petition. The tort claim was voluntarily dismissed, without prejudice, against the individual respondents soon after the termination of the trial.

On July 10, 1980, the petitioner filed the instant suit in the district court, and the respondents filed an answer to the complaint. After the filing of the answer, the district court held a status conference during which time the district judge sua sponte suggested that the respondents submit motions for summary judgment on the basis of res judicata. In accordance with the aforesaid suggestion,

the respondents filed the respective motions, and the district court granted them. On appeal to the Sixth Circuit, the court affirmed the decision of the district court in a one-page order. The application for rehearing en banc was denied by the Court of Appeals.

REASON FOR GRANTING THE WRIT

The decision below is contrary to the established doctrine of Res Judicata and Collateral Estoppel generally adhered to by this Court, and it violates the principles enunciated in Allen v. McCurry, 449 U.S. 90 (1980). The decision raises significant and recurring problems with respect to the preclusive effect of a state-court judgment vis-a-vis the protection of constitutional rights.

The question before this Court may be stated as follows: Is petitioner precluded from litigating her civil rights claims in the federal court simply because of the adjudication of common-law and statutory issues in an earlier state court action between the parties?

The Sixth Circuit affirmed the dismissal of the petitioner's Section 1983 action in a summary manner. A cursory reading of the instant complaint in conjunction with the proceedings in the State court will readily disclose the serious error below. The

district court misapprehended the nature of the petitioner's claims and seriously misplaced the doctrine of res judicata. It is significant to note that the district court applied the bar of res judicata to all of the federal claims of the petitioner, even though such claims were not before the State court, with the exception of the claim regarding the denial of reemployment for the year 1980-1981. The court misconstrued the allegations regarding the violation of the petitioner's liberty interest in her good name, reputation, honor and integrity as being a common-law claim for defamation.

The egregious nature of the district court's action is perceived from its finding that the petitioner is precluded from asserting her constitutional claims in the federal court because she had her day in court against the same parties, although on common-law and statutory issues. With reference to the First Amendment claim, the district court applied the bar of res judicata to that issue on the ground that the "Sixth Circuit has held that state courts are competent to decide questions arising under the federal constitution." Coogan v. Cincinnati, 431 F.2d 1209 (6th Cir. 1970), cert. denied, 401 U.S. 939. In other words, the courts below decided that a Section 1983 claimant is precluded from invoking the

jurisdiction of the federal court simply because he or she could have litigated the claim in the state court. With no name-clearing hearing awarded the petitioner, the district court found, nonetheless, that the bar of res judicata was appropriate to the claim of stigmatization because it "arises from the same claim and set of circumstances which were litigated in the state court."

The complaint's allegations of civil rights violations are broader than the common-law tort of defamation. The appropriate and effective response to the rationale of the lower courts is to be found in the concurring opinion of Justice Harlan in Monroe v. Pape, 365 U.S. 167, wherein he declared:

> ...a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right, and, therefore, deserves a different remedy even though the same act may constitute a state tort and the deprivation of a constitutional right.

Justice Harlan, in Pape, stated further:

> It would indeed be the purest coincidence if the state remedies for violations of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

The decision of the Sixth Circuit is in clear disregard of the rationale and decision of this Court in Allen v. McCurry, 449 U.S.90 (1980). The record discloses that the only issue which had been litigated in and adjudicated by the State court involved the common-law issue of breach of contract against the board. Although the complaint also set forth the common-law claim of conspiracy against the individual defendants, that issue had not been litigated. It was dismissed. Only the contract issue was heard and determined by the State court.

The issues adjudicated in the State court are not at all the equivalent of a Section 1983 proceeding. The doctrine of res judicata can operate as a bar only in a situation where the subsequent suit between the parties or their privies is on the same cause of action. Unless the subsequent suit is predicated on the same claim or cause of action as that of the earlier suit, res judicata can have no application, whatsoever. However, where the subsequent cause of action or claim is not the same, but there is an identity of parties, a point of law or a fact which was fully and fairly litigated, may not be drawn in question in the subsequent suit. This Court in Montana v. United States, 440 U.S. 147, 153, in considering the principle of collateral

estoppel, stated that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the case.

Allen v. McCurry involved a suit for violation of civil rights under 42 U.S.C., Section 1983. McCurry was convicted of possession of heroin and of assault with intent to kill in the state court. His motion to suppress certain evidence that had been seized by the police in the alleged violation of his Fourth and Fourteenth Amendments rights had been denied by the state court. McCurry failed to assert that the state courts had denied him a "full and fair opportunity" to litigate his claims that a police search of his house was illegal, and thus he was barred by Stone v. Powell, 428 U.S. 465 (1976) from seeking a federal habeas corpus writ. Later McCurry brought suit for damages under Section 1983, alleging a conspiracy to violate his rights by an unconstitutional search and seizure of his house. The federal district court granted summary judgment for the defendants, holding that the doctrine of collateral estoppel prevented McCurry from relitigating the search and seizure question already decided against him in the state courts. The Court of Appeals reversed on the ground that

collateral estoppel, though generally applicable to Section 1983 actions, is not appropriate in this case because the 1983 suit was the only route to a federal forum for McCurry to assert his constitutional claim. The opinion of this Court reversed and remanded. The majority opinion, written by Justice Stewart, pointed out that there is nothing in the language of Section 1983 or its legislative history that indicates any congressional intention of denying binding effect to a state court judgment which actually and directly adjudicated a federal constitutional claim. The minority opinion written by Justice Blackmun, and joined by Justices Brennan and Marshall, stated that the remedy sought in a Section 1983 action is totally different from the relief sought by McCurry in a state criminal trial, and, therefore, that the federal court should be the final arbiter of his federal constitutional civil claim.

Based on the factual record of this case, the petitioner's complaint herein finds support in both the majority and minority opinions in Allen v. McCurry. In Allen, this Court was confronted with a factual situation wherein the complainant sought to litigate, had a full and fair opportunity to litigate, and did litigate the federal constitutional claim in the state court.

McCurry was actually seeking to relitigate this identical federal claim in his civil rights action in the federal court.

In our case, the record is clear and unequivocal that the petitioner did not submit her 1983 claims, or any constitutional claims, to the state court for determination, and, therefore, there is no decision of that court on any of the federal issues presented in the district court. The crux of the Allen V. McCurry decision is that McCurry had properly and fully litigated his federal claim in the state court. According to the traditional doctrines of preclusion, res judicata does not apply when the subsequent suit is on a different cause of action. We believe it is beyond dispute in the instant case that the cause of action asserted in the federal court is clearly different from the cause of action alleged and litigated in the state court. It follows, therefore, that the doctrine of res judicata is not applicable to the present case. However, our next concern is to consider the preclusive effect of the traditional principle of collateral estoppel. This principle, in essence, prohibits the relitigation of any issues actually decided after a full and fair hearing in a prior action. There is no support whatsoever in the record of our cause to justify the invocation of the doctrine of

collateral estoppel. In our situation, we are not attempting to relitigate a federal claim which has been fully and directly litigated in another court of competent jurisdiction. A court may not consider and adjudicate a claim unless that claim has been submitted to it by means of proper pleadings according to established judicial rules of procedure and practice. The character of a cause of action is determined by the allegations contained in the complaint. It is not unusual for one particular set of operative facts to give rise to different actions. There can be no contention of "relitigation" or "adjudication" where a claim has not been asserted, and properly litigated in a court of competent jurisdiction. This Court in McCurry accorded a binding effect to the state court judgment because that court actually and properly adjudicated the federal constitutional issue which McCurry sought to relitigate in connection with a civil rights action subsequently filed by him in the federal court. In fact, McCurry requested the determination of the federal issue by the state court. The significant term used by the courts is "relitigate." Before the concept of "collateral estoppel" may be applicable, the point of law or of fact drawn in question in a subsequent suit must have been actually and fully litigated in the prior

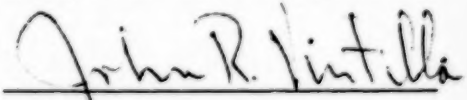
action. The record in the instant cause is devoid of any support for the conclusion that the petitioner sought to litigate or did litigate her federal constitutional claims in the state court. The statement that a party had a "full and fair opportunity to litigate" an issue in an earlier case, presupposes that the issue was submitted to the court for determination, and was properly adjudicated by the court. The petitioner did not submit federal claims to the state court in the prior action between the parties; and, therefore, she is not confronted in the instant case with a situation in which the state court decided a federal question adversely to her. Obviously, no preclusive effect arises where federal rights have not been presented to the state court for adjudication. The Sixth Circuit has committed prejudicial error in affirming the decision of the district court which barred the petitioner from litigating her federal claims in the federal court.

CONCLUSION

Allen v. McCurry has brought about a divergence of views among the lower courts regarding the applicability of the preclusive doctrines of res judicata and collateral estoppel in the area of civil rights litigation. We believe the instant cause clearly exemplifies the problem, and, therefore needs the expeditious attention of this Court.

In view of the foregoing arguments, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 81-3161

DR. ETHEL D. MIGRA,
Plaintiff-Appellant,
-vs-
THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION: CATHERINE O. SWAN; HENRY J. ANGELO; WILLARD T. REUBEN; RAYMOND TESNER; MARY MILHEIM; BARBARA MILLER; ROBERT PEQUES,
Defendants-Appellees.

O R D E R

Before: EDWARDS, Chief Judge, KENNEDY and CELEBREZZE, Senior Circuit Judges.

On receipt and consideration of an appeal in the above-styled case wherein summary judgment was entered in favor of defendants dismissing appellant Migra's § 1983 action arising out of her dismissal by the Board of Education of Warren, Ohio,

The judgment of the District Court is hereby affirmed for the reasons spelled out in considerable length in the thoughtful and well reasoned order and opinion of District Judge John Manos, dated February 17, 1981.

Entered by order of the Court

/s/ John P. Hehman
Clerk

Filed June 3, 1982

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 81-3161

DR. ETHEL D. MIGRA,
Plaintiff-Appellant,
-vs-
WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

ORDER

Before: EDWARDS, Chief Judge; KENNEDY, Circuit Judge, and CELEBREZZE, Senior Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court

/s/ John P. Hehman
Clerk

Filed July 27, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. ETHEL D. MIGRA,	)	CASE NO. C80-1183-Y
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	ORDER
	)	
THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	)	
	)	
Defendants.	)	

The plaintiff, Dr. Ethel D. Migra, filed the above-captioned case on July 10, 1980 against the defendants, The Warren City School District Board of Education, and the individual members of the Board. She seeks relief under 42 U.S.C. §§ 1983 and 1985, claiming that members of the school board conspired under color of state law to deprive her of rights guaranteed under the First, Fifth, and Fourteenth Amendments to the United States Constitution when they unlawfully rescinded her contract with the Warren City Schools for 1979-1980 school year. Compensatory and punitive damages as well as injunctive and declaratory relief are sought by the plaintiff. Jurisdiction is based on 28 U.S.C. §§ 1331(a), 1343(3).

The defendants have filed motions for summary judgment based on res judicata and the running of the statute of limitations. The court finds that there are no genuine issues of material fact to be litigated, and grants the defendants' motion for summary judgment. Rule 56, Federal Rules of Civil Procedure, Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979), cert. denied, 444 U.S. 996, 100 S. Ct. 495 (1979).

The facts are not in dispute that on April 17, 1979 the Warren Board of Education passed a unanimous resolution to renew the plaintiff's limited contract for the 1979-1980 school year as supervisor of Elementary Education for the Warren City School District. On April 23, 1979 the plaintiff tendered a letter of acceptance to board member Constance Goldberg, and requested that Goldberg deliver the letter to the superintendent of schools, which she did the following morning. On April 24, 1979 board president Henry Angelo called a special meeting of the board during which the board voted not to renew the plaintiff's contract. The special meeting was held after the plaintiff's letter of acceptance had been delivered to the superintendent of schools. Notice of the nonrenewal was delivered to the plaintiff on April 27, 1979.

On July 7, 1979 plaintiff Migra filed a complaint in the Trumbull County Common Pleas Court against the Warren City School District Board of Education and the individual board members who voted for non-renewal of her contract: Henry J. Angelo, Catherine O. Swan and Barbara A. Miller. The complaint alleged the following causes of action:

1) that her limited teaching contract and supplemental contract were illegally non-renewed under the laws of the State;

2) that the defendants anticipatorily breached her contract;

3) that the individual defendants Angelo, Swan and Miller were maliciously conspiring to deprive plaintiff of her contract rights; and

4) that the defendants Angelo, Swan and Miller conducted an unlawful meeting with the purpose of depriving plaintiff of her contract rights.

In her prayer the plaintiff sought declaratory relief, the award of compensatory damages equal to the amount of money she would have earned during the 1979-1980 school year and the 1979 summer session, as well as punitive damages.

After a trial on the merits held on January 3 and 4, 1980, the Court of Common Pleas of Trumbull County, Ohio entered extensive

findings of fact and conclusions of law.[1] The court found a valid contract existed between the board and the plaintiff on April 24, 1979 and that the action by the board to non-renew the contract was void because the special meeting at which the vote was taken had been held in violation of section 3113.16 of the Revised Code.[2]

Along with finding the special meeting of April 24, 1979 was a nullity and that the vote against renewal was void, the court also found:

> [T]he relationship between a teacher and a board of education is contractual and one that is protected against impairment by any state law by Article I Section 10 of the United States Constitution and by the Due Process Clause of the Fourteenth Amendment, subject to the qualification that

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1 The opinion of the Honorable Donald R. Ford was entered March 10, 1980.

2 Section 3313.16 Special meetings of board.

> "A special meeting of a board of education may be called by the president or clerk thereof or by any two members, by serving a written notice of the time and place of such meeting upon each member of the board at least two days prior to the date of such meeting. Such notice must be signed by the official or members calling the meeting. For the purpose of this section, service by mail is good service."

The court found that the special meeting on April 24, 1979 was called without having the notice signed as required by statute.

> pertinent state statutes in effect at the time a contract is formed are to be read into it.[3]

Based on its findings, the court ordered the plaintiff immediately reinstated, and awarded her compensatory damages in the amount due under the contract, less the amount of unemployment compensation she had received.

The court also determined that the plaintiff's contract for summer school employment was not inherently bound to or guaranteed by her contract for the 1979-1980 school year, and thus the board was not required to award her a contract for summer employment. The court further found that members of the board had not violated the Ohio "Sunshine Law," OHIO REV. CODE ANN. § 122.22 (Page). The court "reserved and continued" plaintiff's allegations of conspiracy, and made no determination on the question of the liability of individual members of the board. However, the record demonstrates that the plaintiff dismissed her

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3 Findings of Fact and Conclusion of Law, March 20, 1980, p. 6. Teacher employment and re-employment contracts are covered by Ohio Revised Code § 3319.08, and under Ohio Revised Code § 3319.09, "teachers" include those in supervisory positions who are certified to teach. Prior to termination of a teaching contract, the board must give the teacher written notice, and a hearing, as specified in detail in Ohio Revised Code § 3319.16.

state claims for conspiracy and malicious interference with contract without prejudice on July 2, 1980.

In the complaint filed with this court under U.S.C. § 1983 the plaintiff alleges:

> 1) that the defendants are members of the Warren City School District Board of Education and, at a special meeting held on April 24, 1979, they illegally non-renewed plaintiff's limited teaching contract as Supervisor of Elementary Education for the Warren City School District, as well as her supplemental limited contract as Director of Summer School for the Warren City School District;[4]
>
> 2) that her non-renewal was in retaliation for exercising her First Amendment rights through her participation in a social studies curriculum proposal for the Warren City Schools and her support for desegregation in the Warren Schools;[5]
>
> 3) that the special meeting at which her contract was non-renewed was illegal and in violation of Ohio Revised Code Section 3313.66 and Ohio

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4 Plaintiff's Complaint, Pars. 8-15.
5 Plaintiff's Complaint, Pars. 22 and 27.

Revised Code Section 122.22;[6]

4) that the defendants defamed the plaintiff by circulating malicious rumors concerning her private life, which caused her humiliation, mental suffering and distress, and the loss of her professional reputation, and made it necessary for her to seek employment outside of the state of Ohio;[7]

5) that the board "arbitrarily refused to rehire her for the 1980-1981 school year," which has resulted in her unemployment from 1979 to the filing of this action on July 10, 1980.[8]

The plaintiff seeks compensatory and punitive damages as a result of the alleged constitutional violations, and she also seeks to enjoin the defendants from further violating the rights, privileges, and immunities guaranteed to her under the Constitution.

The defendant contends that the decision of the court of common pleas is res judicata and, therefore, operates as a bar to the causes of action the plaintiff brings in this court.

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6 Plaintiff's Complaint, Pars. 20 and 30.
7 Plaintiff's Complaint, Pars. 16,24 and 25.
8 Plaintiff's Complaint, Par. 30.

Res judicata is a rule based upon judicial policy which favors certainty in legal relations, and the finality of judgments, and disfavors repetitious lawsuits. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S. Ct. 715 (1948). The rule was summarized in Southern Pacific R. Co. v. United States, 168 U.S. 1, 18 S. Ct. 18, wherein the court held:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Id. at 49.

Furthermore, the rule binds parties and their privies,

> "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Cromwell v. County of Sac, 94 U.S. 351, 352.

The Supreme Court by way of dicta in Preiser v. Rodriguez, 411 U.S. 475, 93 S. Ct. 1827 (1973) held that res judicata is applicable to a cause of action brought under 42 U.S.C. § 1983. See also: Huffman v. Pursue, 420 U.S. 592, 606, n. 18, 95 S. Ct. 1200, 1209, n. 18 (1975); Wolff v. McDonnell, 418 U.S. 539, 554, n. 12 (1974). The issue was not given careful consideration, however, until the recent case, Allen v. McCurry, __U.S. __, 101 S. Ct. 441 (1980).

In Allen the court considered the argument that unique purpose and legislative history behind the enactment of the Civil Rights Statutes of 1877 evidences Congressional intent to limit the application of res judicata and collateral estoppel in actions brought under 42 U.S.C. § 1983. The argument is that the Civil Rights Statutes of 1877 provide direct redress in federal court for state violations of constitutional rights because of the historic unwillingness and inability of the states to protect those rights at the time the statutes were enacted. It is claimed that because of the special responsibility entrusted to the federal courts to protect constitutional rights, general rules of res judicata should not be applied to foreclose plaintiffs from seeking redress in

federal court. This argument was rejected by the court.

The court in Allen held that the legislative history of section 1983, and the case law interpretation of the statute, did not support limiting the general rule of res judicata:

> To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42nd Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in Monroe v. Pape, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that

> already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court... But the Court's view of § 1983 in Monroe lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.

Id. at 418 (citations omitted).

While holding that res judicata is applicable to section 1983 claims that have actually been litigated in prior court proceedings, the court in Allen did not address the issue of whether a section 1983 claimant can litigate an issue in federal court which might have been raised, but was not raised in previous litigation. Allen v. McCurry, supra, p. 415, n. 5. There is a split of authority among the circuits over the issue, but the Sixth Circuit has held that a final judgment is res judicata to all the issues which might have been presented in the prior proceeding, as well as to those issues which were actually litigated. Coogan v. Cincinnati Bar Association, 431 F. 2d 1209 (6th Cir. 1970), cert.

denied, 401 U.S. 939; Mayer v. Distel Tool and Machine Company, 556 F.2d 798.[9]

The court holds that the plaintiff's claim that her Fifth and Fourteenth Amendment property and due process rights were violated because of the non-renewal of her 1979-1980 contract are barred under the doctrine of res judicata. The common pleas court specifically found that the plaintiff's contract was protected by the due process clause of the Fourteenth Amendment, and that non-renewal of her contract was void on the failure of the board to comply with section 3313.16 of the Ohio Revised Code.

The plaintiff's First Amendment claim was not actually litigated in the prior suit, but is nonetheless barred by res judicata. Although a plaintiff may bring her constitutional claims in federal court, the Sixth Circuit has held that state courts are competent to decide questions arising under the federal constitution. Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325 (6th Cir. 1967), cert denied, 389 U.S. 897. See also Bailey v. Street, 449 F. Supp. 1 (D. Tenn. 1976).

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9 Accord. see, e.g. Lovely, v. Laliberte, 498 F.2d 1261 (6th Cir. 1974); Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975), cert. denied, 96 S. Ct. 807 (1976). But see, Orn-Stein v. Regan, 574 F.2d 115 (2nd Cir. 1978).

Furthermore, in Tomsick v. Jones, 464 F. Supp. 371, 174 (D.C. Colo. 1979), a case on all fours with the one before the court, it was held:

> In the case at bar plaintiff seeks to relitigate the same issues as ruled on by the state court: whether his discharge was in retaliation for the exercise of his First Amendment rights and whether he was denied due process by the fact that the special meeting at which he was discharged was illegal under state law. The differences between the two proceedings are merely technical; the state complaint named the Board of County Commissioners as defendant while this action names the individual board members as defendants. Plaintiff seeks $205,000 in damages in this action while he was awarded only several hundred dollars in the state case.
>
> Given these facts, I can only conclude that the state action as a matter of res judicata bars the present action. If plaintiff was dissatisfied with the award in the state action his remedy was to appeal it. Since he has failed to do so, that judgment is final and this court is precluded from retrying the same matter in federal court. Under these circumstances a plaintiff may not litigate in a state court and then attempt to use the state court decision as a base for launching a federal court action.

Id. The plaintiff could have brought her First Amendment claim in state court and she

is, therefore, barred from asserting it here. Coogan v. Cincinnati, 431 F.2d 1209 (6th Cir. 1970), cert. denied, 401 U.S. 939.

The claimed violations of OHIO REV. CODE ANN. §§ 3313.16 and 122.22 (Pages), as well as the alleged denial of the right to summer school employment are also barred by res judicata.

The plaintiff also claims that she was defamed by members of the board. There are no particular allegations made in the complaint about the facts and circumstances giving rise to this cause of action, but a common sense reading of the complaint indicates the cause of action arises out of certain conduct of board members prior to and including April 14, 1979. The court holds that the alleged defamation arises from the same claim and set of circumstances which were litigated in state court and is, therefore, barred.

Furthermore, the plaintiff's defamation claim is barred by the statute of limitations. In a cause of action brought pursuant to 42 U.S.C. § 1983, the court is to apply the most analogous state statute of limitations to the underlying constitutional claim. Mason v. Owen-Illinois, 517 F.2d 520 (6th Cir. 1975); Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977). The most clearly analogous state statute, section 2305.11 of the Ohio Revised Code,

provides a one-year period within which to bring actions for defamation. The plaintiff's cause of action arose on or before April 24, 1979. The instant cause of action was not filed until July 10, 1980, and on that date the statute of limitations had run on the alleged defamation.

Finally, the plaintiff makes vague allegations that the defendants "arbitrarily refused to hire her for the 1980-1981 school year." The plaintiff does not assert any entitlement to employment past the 1979-1980 school year, nor does she make allegations that indicate how the board's failure to rehire her for the 1980-1981 year deprived her of a right secured by the constitution or laws of the United States. 42 U.S.C. § 1983. The claim fails to state a claim upon which relief may be granted. Rule 12(b)(6), Federal Rules of Civil Procedure.

For the foregoing reasons, the defendant's motions are granted.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. ETHEL D. MIGRA, Plaintiff,	)	CASE NO. C80-1183-Y
v.	)	Judge John M. Manos
THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al., Defendants.	)	FINAL JUDGMENT ORDER

Pursuant to the order and opinion issued in the above-captioned case on this date, the motions of the defendants for summary judgment are granted.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

(Filed February 17, 1981)

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C., Section 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., Section 1985(3)

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-738

In The
Supreme Court of the United States
October Term, 1982

DR. ETHEL D. MIGRA,
Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 19, 1982.
Certiorari Granted January 10, 1983.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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The following documents have not been reproduced in the Joint Appendix inasmuch as they appear in the Appendix to the Petition for Writ of Certiorari.

Order of the United States District Court of Appeals for the Sixth Circuit, filed June 3, 1982	P. A.-15
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Final Judgment Order of the United States District Court, filed February 17, 1981	P. D-32

DOCKET ENTRY

Date	NR	Proceedings
1980		
7/10/80	1	COMPLAINT filed. Summons issued. Copies of Complaint with copies of summons to United States Marshal.
7/10/80	2	PLAINTIFF'S Request for the production of documents filed. Copies issued.
7/10/80		INITIAL ORDER issued.
		DECISION as to The Magistrate Exercising Jurisdiction issued.
7/21/80	3	PRETRIAL Order filed. Manos, J.
7/31/80	4	SUMMONS returned and filed.—Served Henry J. Angelo 7/26/80; served Willard T. Reuben 7/26/80; served Catherine O. Swan 7/26/80; FEES: $9.00
8/ 6/80	5	SUMMONS returned and filed.—Served Robert Peques 7/29/80; served Raymond Tesner 7/28/80; served Mary Milheim 7/28/80; served The Warren City School District Board of Education 7/29/80; FEES: $12.00
8/14/80	6	SUMMONS returned and filed.—Served Barbara Miller 8/1/80; FEES: $3.00
8/14/80	7	ANSWER of Defts., Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim & Barbara Miller to the complaint filed. copies mailed 8/12/80
8/13/80	8	ANSWER of Deft., The Warren City School District Board of Education filed. copies mailed 8/13/80
9/ 9/80	9	DECISION as to the Magistrate exercising Jurisdiction returned and filed.—all parties *do not* consent to have a Magistrate conduct any & all further proceedings.
9/10/80	10	MOTION of Individual Defts., Reuben, Tesner, & Milheim for Summary Judgment, with memorandum in support and

affidavits in support filed. copies mailed 9/10/80

9/10/80 11 ENTRY of Michael J. Loughman as additional trial counsel on behalf of Defts., filed. copies delivered 9/10/80

9/26/80 12 MOTION of Defts., Swan, Angelo, Reuben, Tesner, Milheim & Miller for Summary Judgment, with memorandum in support filed. copies mailed 9/24/80

10/ 3/80 13 MOTION of Deft., The Warren City School Dist. Board of Education for Summary Judgment, with memorandum in support and affidavit and exhibits in support filed. copies mailed 10/3/80

10/14/80 14 BRIEF of Pltf., in opposition to motion for Summary Judgment of Defts., Swan, Angelo, Reuben, Tesner, Milheim & Miller & Deft., City School Warren City School District Board of Education filed. copies mailed 10/10/80

1981

2/17/81 15 ORDER granting defts. motion for Summary Judgment. The court finds there are no genuine issues of material fact to be litigated & grants the defts. motion of Summary Judgment, based on res *judicata* and the running of the statute of Limitations filed. Manos, J.—copies mailed (noted 2/18/81)

2/17/81 16 FINAL JUDGMENT Order, pursuant to the Order and opinion issued on this date, the motions of the defts., for Summary Judgment are granted filed. Manos, J. copies mailed (noted 2/18/81)

1982

3/13/82 NOTICE of Appeal by pltf. re: 2/17/81 filed. c/m to Vintilla, Messenger, Loughman & USCA 3/16/81

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-1183-Y

DR. ETHEL D. MIGRA,
2840 Sheridan Road, Evanston, Illinois 60201,
Plaintiff,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, 261 Monroe Street, N. W., Warren Ohio 44482; CATHERINE O. SWAN, 349 Porter Street, N. E., Warren, Ohio 44483; HENRY J. ANGELO, 195 Oak Knoll, N. E., Warren, Ohio 44483; WILLARD T. REUBEN, 547 Perkinswood, N. E., Warren, Ohio 44483; RAYMOND TESNER, 868 Kenmore, N. E., Warren, Ohio 44483; MARY MILHEIM, 3090 Foster Drive, Warren, Ohio 44483; BARBARA MILLER, 23 Monestary Road, Savannah, Georgia 31411; ROBERT PEQUES, 261 Monroe Street, N. W., Warren, Ohio 44482,
Defendants.

COMPLAINT WITH JURY DEMAND
(Filed July 10, 1980)

1. This is a proceeding to redress the violations of rights guaranteed to the plaintiff by the Constitution of the United States. The action arises under the First, Fifth, and Fourteenth Amendments to the Constitution, and Sections 1983 and 1985 of Title 42 of the United States Code, as hereinafter more fully appears. Jurisdiction is conferred on this Court by 28 U. S. C., Section 1331 (a), and 1343 (3). The amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. The individual defendants, Catherine O. Swan, Henry J. Angelo, Barbara Miller, Willard T. Reuben, Raymond Tesner, and Mary Milheim, are now and were

at all times material hereto the duly elected, qualified and acting members of the Warren City School District Board of Education, and have under their control all the respective officials and teachers of all public schools within the City of Warren, Ohio. The defendant-board has general supervision over the enforcement of rules and regulations prescribed by it for the conduct of all public schools within said City. The individual defendants and all the officials and teachers of the various public schools of said City are agents, servants, and employees of the Warren City School District Board of Education in the enforcement of all said rules and regulations.

3. At all times pertinent to this Complaint, the defendants, in doing the acts and things hereinafter set forth, were acting, in their respective capacities as stated, under color of the laws of the State of Ohio.

4. Defendant, Robert Peques, is the Superintendent of Schools in the Warren City School District, and is responsible for overseeing the instructional, administrative and financial activities of the Warren City Public Schools.

5. At times relevant hereto, James Culver and Constance Goldberg were members of, and, along with defendants, Henry J. Angelo, Catherine O. Swan and Barbara A. Miller, constituted the Warren City School District Board of Education.

6. Each defendant is sued individually and in his or her official capacity. Relief is sought against each and all defendants as well as its or their agents, assistants, successors, employees, and all persons who acted or are acting in concert and cooperation with them at their direction.

7. Plaintiff, Dr. Ethel D. Migra, has been employed by the Warren City School District as Supervisor of Elementary Education on a yearly basis pursuant to written contracts for the school years commencing on August 13, 1976, and continuing uninterruptedly for each year thereafter until and to June 15, 1979.

8. As Supervisor of Elementary Education for the Warren City School District, plaintiff had become the Director and Administrative Consultant to a Commission appointed by the defendant-board to devise a voluntary plan for the desegregation of the elementary schools of the Warren City School District pursuant to Title VII of Public Law 92-318, and, as amended in 1974, Public Law 93-380, commonly known as the "Emergency School Aid Act."

9. By virtue of the position of Supervisor of Elementary Education, plaintiff headed a Committee of teachers charged with the responsibility of preparing and formulating a Social Studies Curriculum for the elementary schools of the Warren City School District.

10. Plaintiff's duties and responsibilities as the Director of Title VII and those in connection with the formulation of a social studies curriculum, as aforestated, were pursued at all times in conjunction with the Commission or the Committee, and in consultation with and the approval of the Superintendent of Schools for the Warren City School District.

11. The desegregation of the elementary schools in the Warren City School District on a voluntary basis had been discussed and was under consideration by the Warren City School Board of Education prior to and at the

time that the plaintiff accepted and entered into the position of Supervisor of Elementary Education for the Warren City School District.

12. The desegregation of the subject schools was required in order that the Warren City School District could qualify for and continue to receive federal funds from the Department of Health, Education and Welfare of the United States under Title VII. A plan, therefore, had been prepared and was submitted to and adopted by the said board whereby the board directed that the integration of the elementary schools would begin with the 1977-78 school year.

13. A social studies curriculum was prepared by the plaintiff and the aforementioned committee and presented to various public meetings for discussion, and ultimately, was submitted to the defendant-board for approval.

14. The plaintiff had actively and publicly participated in the resolution of the highly controversial policy matters of desegregation and the social studies curriculum as required by reason of her position as Supervisor of Elementary Education.

15. The individual defendants vigorously and vehemently objected to, intensely rejected and actively opposed the Committee's social studies curriculum proposal for the elementary schools of Warren, Ohio, and clandestinely fought and resisted the Commission's plan to voluntarily desegregate the elementary schools of the subject city. The defendants thereby developed a fierce hostility to and manifested ill-will and hatred toward the plaintiff. As a consequence thereof, they determined to non-renew the plaintiff's contract of employment.

16. Throughout the period of the deliberations by the Committee on social studies, and by the Commission to devise a plan for desegregation, the defendants deliberately disseminated and circulated malicious rumors among the board members and others in the community about the private life and activities of the plaintiff, which they knew or should have known to be false, scandalous and misleading. These actions were taken by the defendants pursuant to a pre-conceived plan to eliminate the plaintiff as the Supervisor of Elementary Education for the Warren City School District.

17. The defendant-board of education, at a regularly scheduled meeting on April 17, 1979, and according to established practice, unanimously approved and renewed the plaintiff's employment contract for the 1979-80 school year as Supervisor of Elementary Education for the Warren City School District. The contract of employment was to run from August 13, 1979 to June 15, 1980 at a salary of $26,010.00, plus automatic increments thereto as provided by the relevant regulations of the School Board.

18. In response to the defendant-board's renewal of plaintiff's contract of employment for the 1979-80 school year, as contained in the board's resolution of April 17, 1979, the plaintiff prepared a letter of acceptance and gave it to Constance Goldberg, a member of the Warren City School District Board of Education, on the night of April 23, 1979, with the instruction that she, Constance Goldberg, deliver the said letter to the Superintendent of Warren School District, Anthony Berarducci, the following morning forthwith.

19. Thereafter, a special meeting of the defendant-board was called for and held at or about 7:00 a.m. on April 24, 1979, for the ostensible and express purpose of considering the matter of Administrator, Dan Cokrlic. This meeting was called and held in violation of Section 3313.16, Revised Code of Ohio, and contrary to the Ohio Revised Code, Section 122.22, commonly known as the "Sunshine Law."

20. The plaintiff's letter of acceptance of the renewal of the contract of employment for the school year 1979-80 was delivered by Constance Goldberg to Floyd Frederick, Clerk-Treasurer of the defendant school board on the morning of April 24, 1979, and, in turn, was given to Mr. Berarducci. This letter of acceptance was given to Henry J. Angelo, the president of the Board of Education, by Mr. Berarducci, on the same morning of April 24, 1979 and was accepted and read by Henry J. Angelo, before the special meeting of the board had convened on that date.

21. At the special meeting of April 24, 1979, of the defendant-board, a motion was made and seconded to nonrenew and to rescind the plaintiff's employment contract for the school year 1979-80. The defendants, Henry J. Angelo, Catherine O. Swan, and Barbara A. Miller, voted in favor of the motion to nonrenew plaintiff's contract. Constance Goldberg opposed the motion and the remaining member of the board, James Culver, was not present. The matter of the non-renewal and the rescission of plaintiff's contract of employment, which had been voted upon and approved unanimously by the defendant-board at its meeting of April 17, 1979, was disposed of summarily and in a furtive manner.

22. Plaintiff avers that had she been given a fair and impartial hearing in accordance with the basic and elemental due process, she could have demonstrated with substantial and credible evidence that the failure to renew her contract for the school year 1979-80, and thereafter, was solely due to the expression of her views and policies with reference to the desegregation of the Warren City Schools, and in respect to the Social Studies Curriculum which was prepared and submitted to the defendant-board for approval, and that the non-renewal of the contract by the defendants was arbitrary, capricious, and unlawful, and was in no manner whatsoever related to her ability or the performance of her duties as Supervisor of Elementary Education for the Warren School District.

23. Plaintiff's credentials in the field of education and her performance as the Supervisor of Elementary Education for the schools in the Warren City School District have been in all ways exemplary, and no real question existed then nor exists now as to her ability to function within the actual and realistic structural needs of the Warren City School District.

24. As a direct result of the concerted and pre-conceived actions of the defendants, alleged above, a stigma has been imposed upon the plaintiff which caused her removal from the position of Supervisor of Elementary Education for the Warren School District, thereby depriving her of the liberty interest in her reputation and her property interest in the continued employment with the Warren City School District in violation of the rights secured to her by the Constitution of the United States.

25. The actions and conduct of the defendants in doing the things hereinabove related, caused plaintiff to

suffer extreme humiliation and embarrassment, severe mental anxiety and distress, as well as a severe nervous disorder of her entire body following the loss of employment and injury to her good name, reputation, and standing in the community. She was compelled to seek employment elsewhere and to uproot and move herself and a daughter to a distant city in order to obtain employment and had to expend much money for the services of legal counsel, and otherwise, to protect and to defend against the violations of her rights. As a direct result of the foregoing, plaintiff is suffering and will continue to suffer for the rest of her lifetime from mental distress, humiliation, embarrassment and defamation of her character and reputation, which will, in part, cause her future loss of earnings and restrict her opportunities to hold respected and trusted positions in her profession and community.

26. The actions and conduct of the individual defendants, jointly and severally, were wanton, malicious, and taken in reckless disregard of the rights of the plaintiff as hereinabove related.

27. The defendants' actions taken jointly and/or severally, including but not limited to the non-renewal of plaintiff's contract for the 1979-80 school year and thereafter, violated the First Amendment to the United States Constitution in that the actions were intended to and did in fact punish the plaintiff for the exercise of her freedom of speech, association, inquiry and academic freedom.

28. The defendants' actions, taken jointly and/or severally, violated the Fifth and Fourteenth Amendments to the Constitution of the United States in that by acting as described more fully above, they have deprived

the plaintiff of property without due process and equal protection. More specifically, the decision not to renew her contract:

(a) Was arbitrary and capricious in that it was based on unlawful and irrelevant criteria, and

(b) Was made without affording her notice and a hearing conducted in accordance with generally accepted principles of elemental fairness and due process.

29. The defendant-board breached its contract with the plaintiff for the 1979-80 school year, and arbitrarily refused to rehire her for the 1980-81 school year, and, as a consequence of its actions and conduct, plaintiff has been without employment for the school year 1979-80, and was compelled thereafter to accept employment and to relocate in another state, for which she has been damaged in the amount of $100,000.00.

30. Until the occurrence of the events as related herein, plaintiff had been employed as the Director of Summer School for the Warren City School District which was funded by Title VII. As a result of the defendant-board's action in terminating her as Supervisor of Elementary Education, plaintiff has not been employed as Director of Summer School for the period of June 18, 1979 through August 1, 1979, and a like period for the summer of 1980, thereby losing the income therefrom in the amount of $2980.00.

WHEREFORE, the plaintiff respectfully prays this Court to:

(a) permanently enjoin and restrain the defendants, their agents, assistants, successors, employees,

attorneys, and all persons acting in concert or cooperation with them or at their direction from further violating the rights, privileges and immunities guaranteed to the plaintiff under the Constitution of the United States of America;

(b) grant compensatory damages to the plaintiff in the sum of $250,000.00;

(c) grant punitive damages to plaintiff in the sum of $250,000.00;

(d) grant plaintiff reasonable attorney fees for the prosecution of this action, and her costs herein;

(e) grant such other relief that this court may deem just and proper.

/s/ JOHN R. VINTILLA
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Tel. No. 781-3352

FRANCIS X. COOK
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Elyria, Ohio 44036
Tel. No. 323-3382

ATTORNEYS FOR PLAINTIFF

JURY DEMAND

Plaintiff demands trial by jury of this action.

/s/ JOHN R. VINTILLA
ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO—
EASTERN DIVISION

CASE NO. C 80-1183-Y
JUDGE JOHN M. MANOS

DR. ETHEL D. MIGRA,

Plaintiff,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

ANSWER

(Filed August 13, 1980)

Now comes Defendant, THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, by and through counsel, who for its separate Answer to the Complaint of Plaintiff:

FIRST DEFENSE

1. Denies the allegations contained in paragraph one (1) for lack of knowledge as to their truth or falsity.

2. Admits the allegations contained in paragraph two (2), except that Mary Milheim, Willard Rubin and Raymond Tesner did not become members of the Warren City Board of Education until January, 1980, and they were therefore not members of Defendant Board of Education at all times material hereto.

3. Denies the allegations contained in paragraph three (3).

4. Admits the allegations contained in paragraph four (4).

5. Admits the allegations contained in paragraph five (5).

6. Denies the allegations contained in paragraph six (6) for lack of knowledge as to their truth or falsity.

7. Admits the allegations contained in paragraph seven (7) and nine (9).

8. Denies the allegations contained in paragraph eight (8).

9. Denies the allegations contained in paragraphs ten (10) and eleven (11).

10. Denies the allegations contained in paragraphs thirteen (13) and fourteen (14) for the purpose of requiring strict proof thereof.

11. Denies the allegations contained in paragraph twelve (12).

12. Admits that some members of the Board of Education were dissatisfied with the Committee's social studies curriculum proposal, but denies the remaining allegations contained in paragraph fifteen (15).

13. Denies the allegations contained in paragraph sixteen (16).

14. Admits the allegations contained in paragraph seventeen (17), but states that said action was taken solely because Plaintiff had promised to resign, and because the Board wished to give Plaintiff the opportunity to resign rather than have her contract not renewed.

15. Admits that Plaintiff delivered a letter to Constance Goldberg, but denies the remaining allegations contained in paragraph eighteen (18), and specifically denies that such letter constituted an acceptance of a contract of employment.

16. Admits that a special meeting of the Board of Education was called for and held on April 24, 1979, but denies the remaining allegations contained in paragraph nineteen (19).

17. Denies the allegations contained in paragraph twenty (20) for the purpose of requiring strict proof thereof.

18. Admits that the Board of Education at the special meeting of April 24, 1979, voted to non-renew Plaintiff's contract but denies the remaining allegations contained in paragraph twenty-one (21).

19. Denies the allegations contained in paragraphs twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29) and thirty (30).

SECOND DEFENSE

1. By ay of Defense, this Defendant states that Plaintiff's Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

2. By way of Defense, this Defendant states that Plaintiff's claims are barred by the doctrine of Res Judicata.

FOURTH DEFENSE

3. By way of Defense, this Defendant states that Plaintiff's claims are barred by the doctrine of collateral estoppel.

WHEREFORE, this answering Defendant prays that Plaintiff's Complaint be dismissed at Plaintiff's costs.

HENDERSON, COVINGTON, STEIN, DONCHESS & MESSENGER

By: _____
James L. Messenger

By: _____
Christopher J. Newman
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Attorneys for Defendant
Warren City
School District Board of Education

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Case No. C80-1183-Y
Judge John M. Manos

DR. ETHEL D. MIGRA,

Plaintiff,

vs.

THE WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,

Defendants.

ANSWER OF DEFENDANTS CATHERINE O. SWAN, HENRY J. ANGELO, WILLARD T. REUBEN, RAYMOND TESNER, MARY MILHEIM AND BARBARA MILLER TO THE COMPLAINT

(Filed August 14, 1980)

1. Defendants admit the allegations of paragraph 1 of the Complaint that this action is brought to redress alleged violations of the First, Fifth and Fourteenth Amendments to the United States Constitution in Sections 1983 and 1985 of Title 42 of the United States Code. Defendants specifically deny any violation of law and deny each and every other allegation of paragraph 1 of the Complaint.

2. Defendants admit that Catherine O. Swan, Henry J. Angelo and Barbara Miller were duly elected, qualified and acting members of the board of education of The Warren City School District at the times referred to in the Complaint but specifically deny that defendants Willard T. Reuben, Raymond Tesner and Mary Milheim were either elected, qualified or acting board members at the times referred to therein. Defendants admit, generally, that the board of education is charged with those duties

and responsibilities imposed by Ohio and Federal law but deny each and every other allegation of paragraph 2 of the Complaint.

3. Defendants deny the allegations of paragraph 3 of the Complaint except as to those actions taken by them as duly elected, qualified and acting board members in the course of meetings of the Warren City School District Board of Education.

4. Defendants admit the allegations of paragraph 4 of the Complaint and further assert that Robert Pegues did not commence his employment until January, 1980 and was not serving the Warren City School District Board of Education in any capacity during the times referred to in the Complaint prior to January, 1980.

5. Defendants admit the allegations of paragraphs 5, 6, 7, 9, 13 and 20 of the Complaint.

6. Defendants deny the allegations of paragraph 8 of the Complaint and assert that plaintiff, together with other administrators in the Warren City School District was designated to serve as a resource person to a commission appointed by the board of education to devise a voluntary plan for the desegregation of the school district.

7. Defendants assert that they are without sufficient knowledge to form a belief as to the truth of the allegations of paragraphs 10 and 11 of the Complaint.

8. Defendants admit the allegations of paragraph 12 of the Complaint that the board of education adopted and implemented a voluntary plan for the desegregation of the Warren City Schools and assert that the plan was adopted

in December, 1977. Defendants deny each and every other allegation of paragraph 12 of the Complaint.

9. Defendants admit the allegations of paragraph 14 of the Complaint that plaintiff was active in the development of a social studies curriculum plan but assert that they are without sufficient knowledge to form a belief as to the truth of each and every allegation of paragraph 14.

10. Defendant Catherine O. Swan admits the allegation of paragraph 15 of the Complaint that she opposed the social studies curriculum proposal but denies each and every other allegation of paragraph 15 of the Complaint. Defendant Mary Milheim, admits that she opposed, as a citizen and not as a member of the board of education, the social studies curriculum proposal but denies each and every other allegation of paragraph 15 of the Complaint. Defendants deny each and every other allegation of paragraph 15 of the Complaint.

11. Defendants deny the allegations of paragraphs 16, 22, 23, 24, 25, 26, 27, 28 and 29 of the Complaint.

12. Defendants admit the allegations of paragraph 17 of the Complaint that the board of education approved the employment of plaintiff under an additional one year limited contract of employment for the 1979-1980 school year but deny that any such contract was ever executed between the board and plaintiff. Defendants Angelo, Swan and Miller further assert that their vote in favor of a further contract of employment for plaintiff was made with the understanding and belief that the plaintiff would resign. Defendants deny each and every other allegation of paragraph 17 of the Complaint.

13. Defendants admit the allegations of paragraph 18 of the Complaint that plaintiff prepared a letter purporting to accept the action of the board of education authorizing a further contract of employment for her but assert that no such written contract had ever been tendered or accepted. Defendants deny each and every other allegation of paragraph 18 of the Complaint.

14. Defendants admit the allegations of paragraph 19 of the Complaint that the action of the board of education authorizing a further limited contract of employment for the 1979-1980 school year was rescinded by the board of education on or about April 24, 1979. Defendants deny each and every other allegation of paragraph 19 of the Complaint.

15. Defendants admit the attendance, motion and vote of the members of the board of education as referred to in the allegations of paragraph 21 of the Complaint but deny each and every other allegation of paragraph 21.

16. Defendants admit the allegations of paragraph 30 of the Complaint that plaintiff had been employed as director of summer school for the Warren City School District and further assert that plaintiff's employment in that capacity was under a supplemental contract of employment which was nonrenewed in April of 1979. Defendants deny each and every other allegation of paragraph 30 of the Complaint.

17. Defendants deny each and every other allegation of the Complaint not specifically admitted herein.

First Defense

18. The complaint fails to state a claim upon which relief may be granted.

Second Defense

19. Defendants Reuben, Tesner and Milheim were not members of the Warren City School District Board of Education until January, 1980, and took no part in the acts complained of in the complaint. The complaint fails to state a claim upon which relief may be granted as to them.

Third Defense

20. Each of these answering defendants has acted in good faith and without malice and is, therefore, immune from liability in this action.

Fourth Defense

21. The claims set forth in the complaint are barred by the doctrine of res judicata or by the doctrine of collateral estoppel because they either were raised or could have been raised in a similar action between Plaintiff and Defendants Board of Education of the Warren City Schools, Catherine O. Swan, Henry Angelo and Barbara Miller which action is now pending before the Court of Appeals of Trumbull County, Case No. 79 CV 591.

Fifth Defense

22. Those portions of the complaint which purport to assert a right to recovery based on defamation or intentional tortious injury are barred by the statute of limitations.

/s/ Robert T. Baker

/s/ Nicholas A. Pittner
Means, Bichimer, Burkholder
& Baker Co., L.P.A.
42 East Gay Street
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Counsel for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-1183-Y

Judge John M. Manos

DR. ETHEL D. MIGRA,

Plaintiff,

vs.

WARREN CITY SCHOOL DISTRICT, BOARD OF EDUCATION, et al.,

Defendants.

MOTION OF INDIVIDUAL DEFENDANTS REUBEN, TESNER AND MILHEIM FOR SUMMARY JUDGMENT

(Filed September 10, 1980)

Now come Willard T. Reuben, Raymond Tessner and Mary Milheim and move the court under the provisions of Rule 56, Federal Rules of Civil Procedure, for summary judgment in their favor.

/s/ Nicholas A. Pittner

/s/ Michael J. Loughman
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& Baker Co., L. P. A.
42 East Gay Street
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Counsel for Defendants
Reuben, Tesner and Milheim

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-1183-Y
Judge John M. Manos

DR. ETHEL D. MIGRA,

Plaintiffs,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

MOTION OF DEFENDANTS CATHERINE O. SWAN, HENRY J. ANGELO, WILLARD T. REUBEN, RAYMOND TESNER, MARY MILHEIM AND BARBARA MILLER FOR SUMMARY JUDGMENT

(Filed September 26, 1980)

Now comes Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim and Barbara Miller and move the court under the provisions of Rule 56, Federal Rules of Civil Procedure, for summary judgment in their favor.

/s/ Nicholas A. Pittner

/s/ Michael J. Loughman
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Counsel for Defendants Swan, Angelo, Reuben, Tesner, Milheim and Miller

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-1183-Y

Judge John M. Manos

DR. ETHEL D. MIGRA,

Plaintiff,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

MOTION

(Filed October 3, 1980)

Now comes Defendant, THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, by and through counsel, and moves the Court under the provisions of Rule 56, Federal Rules of Civil Procedure, for summary judgment in its favor.

Henderson, Covington, Stein, Donchess & Messenger

By: James L. Messenger

By: Christopher J. Newman
600 Wick Building
Youngstown, Ohio 44503
Telephone: (216) 744-1148
Attorneys for Defendant, Warren City School District Board of Education

MEMORANDUM IN SUPPORT OF MOTION

This Motion for summary judgment is submitted to the Court under the authority of Rule 56, Federal Rules of Civil Procedure. The basis of this Motion for summary judgment is that the claims of Plaintiff asserted in her Complaint are barred by the doctrine of Res Judicata and the one year statute of limitations for defamation under Ohio Revised Code Section 2305.11.

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Case No. 79-CV-571

DR. ETHEL D. MIGRA,
2637 Woodland NE, Warren, Ohio 44483,

Plaintiff,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, Warren, Ohio 44482 and HENRY J. ANGELO, 195 Oak Knoll Street NE, Warren, Ohio 44483 and CATHERINE O. SWAN, 349 Porter Street NE, Warren Ohio 44483 and BARBARA A. MILLER, 745 Oak Knoll Street NE, Warren, Ohio 44483,

Defendants.

COMPLAINT

(Filed June 7, 1979)

Count I.

1. Plaintiff, Dr. Ethel D. Migra, has been employed by the Warren City School District as supervisor of elementary education pursuant to written contracts, for the school years August 13, 1976 to June 15, 1977, August 13, 1977 to June 15, 1978 and August 13, 1978 to June 15, 1979.

2. On April 17, 1979, the defendant, Warren City School District Board of Education, at a regularly scheduled meeting, upon recommendation of the superintendent, formally renewed plaintiff's employment contract with the Warren City School District at the stated salary of $24,700.00 for the contract year August 13, 1979 to June

15, 1980. Said renewal was by an unanimous vote of the entire Board of Education.

3. On April 18, 1979, plaintiff accepted the renewal of her contract for the school year August 13, 1979 through June 15, 1980 by tendering written notice of acceptance to a member of the Warren City School District Board of Education.

4. On April 24, 1979 at approximately 7:00 a.m., the Warren City School District Board of Education held an alleged "Special Meeting" of the Board for the purpose "discussing any matters that may come before the Board".

5. At the aforementioned "Special Meeting" of April 24, 1979, Board Members Henry J. Angelo, Catherine O. Swan and Barbara A. Miller, via a series of procedural irregularities, purportedly passed a resolution deleting plaintiff's name from the list of those administrative staff employees whose 1979-1980 school contracts were renewed at the regular April 17, 1979 (aforementioned) meeting of the Warren City School District Board of Education.

6. Plaintiff states that the action of the defendant School Board in canceling her 1979-1980 school contract was illegal under the laws of the State of Ohio and that despite formal demand the Board has refused to acknowledge Dr. Migra's contract.

7. Plaintiff states that her salary for the 1979-1980 school contract year is $24,700.00 and that the Board's action, if allowed to stand, will damage her in that amount.

Count II.

8. Plaintiff realleges paragraphs 1 through 7 as if fully rewritten herein.

9. Plaintiff states that because of the "cancellation" of her 1979-1980 contract as Supervisor of Elementary Education, she has not been employed as Director of Summer School for the Warren City School District for the period June 18, 1979 through August 1, 1979.

10. Plaintiff states that her salary as Director of Summer School, funded by Title VII, is $1,490.00 and the Board's action has damaged her in that amount.

Count III.

11. Plaintiff realleges paragraphs 1 through 10 as if fully rewritten herein.

12. Plaintiff states that the defendant Board anticipatorily breached its contract with the plaintiff for the 1979-1980 school year on April 24, 1979 when it publicly renounced same.

13. Plaintiff was damaged in the amount of $24,-700.00 as the result of such breach by the defendant School Board.

Count IV.

14. Plaintiff realleges paragraphs 1 through 13 as if fully rewritten herein.

15. Plaintiff says that between April 17, 1979 and April 24, 1979 defendants Henry J. Angelo, Catherine O. Swan and Barbara A. Miller did by unlawful meetings wherein the public business was conducted willfully and maliciously conspire to deprive the plaintiff of her contract rights with the Warren City School District.

16. Plaintiff states that the action by defendants Angelo, Swan and Miller has caused her to be damaged in the amount of $26,190.00.

Count V.

17. Plaintiff realleges paragraphs 1 through 16 as if fully rewritten herein.

18. Plaintiff says that between April 17, 1979 and April 24, 1979, Henry J. Angelo, Catherine O. Swan, and Barbara A. Miller did by unlawful meetings conducted outside the scope of their authority as members of the Warren City School District Board of Education conspire to deprive the plaintiff of her contract rights with the Warren City School District.

19. Plaintiff states that the action by defendants Angelo, Swan and Miller has caused her to be damaged in the amount of $26,190.00.

WHEREFORE, for the aforementioned reasons, plaintiff demands:

1. that her 1979-1980 contract of employment with the Warren City School District be declared valid or defendants found to have breached same.

2. that she be awarded $1,490.00 as damages from the defendant Board for loss of her Summer School Contract.

3. that plaintiff be awarded $24,700.00 compensatory damages and $25,000.00 in punitive damages from the defendants.

4. such other relief as the court deems just.

/s/ James M. Caulfield
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Attorneys for Plaintiff

IN THE COURT OF COMMON PLEAS,
TRUMBULL COUNTY, OHIO

Case No. 79-CV-571

DR. ETHEL D. MIGRA,

Plaintiff,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed March 20, 1980)

Findings of Fact

1. The defendant board in its resolution of April 17, 1979, approved the renewal of a limited contract with the plaintiff for the 1979-80 school year as Supervisor of Elementary Education for the Warren City School District. The contract period was to run from August 13, 1979 to June 15, 1980. (See Joint Exhibit A; p. 65 of Dr. Migra transcript).

2. The plaintiff wrote a letter of acceptance on th 23rd of April, 1979, in response to the defendant board's renewal contained in its resolution of April 17, 1979, which letter of acceptance was dated April 18, 1979, by her. The plaintiff submitted this acceptance letter to board member Constance Goldberg on the night of April 23, 1979, and requested that she deliver this letter to Superintendent Anthony Berarducci the next morning. (See Joint Exhibit F; pp. 12 and 13 of Dr. Migra transcript.)

3. Joint Exhibit F, the plaintiff's letter of acceptance, was delivered by Constance Goldberg on the morn-

ing of April 24, 1979, to Superintendent Berarducci's office to his secretary who gave it to Mr. Berarducci who in turn submitted it to board president Henry Angelo who accepted and read it before the special board meeting of April 24, 1979, began and before any nonrenewal action or recission was attempted. (See pp. 29 and 34 of Berarducci deposition; see testimony of Henry Angelo as for cross-examination in connection with Joint Exhibit F.)

4. The special board meeting of April 24 was called by board president Henry Angelo. (See testimony of Henry Angelo, Floyd Fredericks, pp. 20-23 of Berarducci deposition.)

5. Board president Henry Angelo did not sign the required notice for this meeting. (Joint Exhibit B; testimony of Henry Angelo and Floyd Fredericks.)

6. Board member James Culver did not receive his written notice of the special board meeting of April 24, 1979, until his return from the National School Boards Convention in Miami, Florida, on the 25th of April, 1979; Mr. Culver did receive a phone call from Carol Hall, Mr. Berarducci's secretary on April 19, 1979, before he left for Florida, but her message to him was that the special meeting on the 24th of April would only involve the matter of the administrator; Dan Cokrlic's name to be taken off administrator's list. (See testimony of Mr. Culver and Carol Hall.)

7. The plaintiff did not receive a written contract document from the board for the 1979-80 school year nor did she or the board execute such a document.

8. Four members of the board were present at the session held on April 24, 1979, at or about 7:45 a.m. with

Mr. Culver being the only absentee. After disposing of Mr. Cokrlic's matter, the subject of plaintiff's status was brought up under "new business." A motion was made and seconded to nonrenew plaintiff for the school year 1979-80. A vote of 3 to 1 was recorded in favor of this motion. (See testimony of Barbara Miller.)

9. The plaintiff received a written notice of nonrenewal from the board on April 27, 1979, through Floyd Frederick, which was personally delivered by him to her at her office. (See Joint Exhibit H; p. 47 of Dr. Migra transcript; testimony of Floyd Frederick.)

10. The status with regard to plaintiff's involvement as a Title VII Director for the summer of 1979 was never finalized. This was not an inherent part of her basic limited contract status, but was to be a supplemental contract. It was never issued. (See Dr. Migra transcript pp. 23, 70-71; p. 37 of Berarducci deposition; Henry Angelo testimony.)

11. The plaintiff started to receive unemployment benefits at the rate of $120.00 on a consecutive weekly basis the week of Aug. 25 (26), 1979, which continued through the date of hearing. (p. 47 of Dr. Migra transcript.)

12. Plaintiff's efforts to mitigate have been reasonable. (pp. 72-74 and 84 of Dr. Migra transcript.)

13. Board members Angelo, Swan, and Miller did not engage in open discussion regarding Plaintiff's status for the school year 1979-80 in the executive session or the board meeting of April 17, 1979. There were separate contacts, however, on this topic as between board president Henry Angelo and Mrs. Swan, and Mr. Angelo

and Mrs. Miller, prior to April 17 and after April 17 up to April 24. The Court finds that during these time frames there was never a time when these three met simultaneously so as to constitute a majority in any prearranged manner to discuss this subject of public business.

14. There is nothing in the evidence to show that the press or news media was notified of the purpose of the special meeting of the 24th of April as it applied to plaintiff. Floyd Frederick's testimony regarding his phone calls to news media on April 20 is that he testified that to the best of his knowledge he did not tell them that anything about Plaintiff was to be on the agenda, and he further testified that he put nothing in the notice posted regarding the meeting of the 24th on the bulletin board of the board's office about plaintiff's contract status to be included in the agenda expressly.

15. The defendant board conducted no action under or pursuant to Ohio Revised Code Section 3319.16 to discharge the plaintiff.

Conclusions of Law

1. Ohio Revised Code Section 3319.08, as amended and effective 8/22/73 provides as follows in the first sentence of the first paragraph:

> The Board of Education of each city . . . school district shall enter into written contracts for the employment and re-employment of all teachers.

The second paragraph of this code section contains the following:

> If a board of education adopts a motion or resolution to employ a teacher under a limited or con-

tinuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not avoid such employment contract.

The Court finds that this section prescribes the form and substance of teaching contracts in the State of Ohio.

a. Administrative supervisors are included within the definition of "teachers" for this purpose. (See Ohio Revised Code Section 3319.09.)

b. The earlier enactments of Ohio Revised Code Section 3319.08, prior to the amendment of this section on 9/18/61, did not use the term "written" in reference to such contracts, nor did they include the language cited above as the present second paragraph of this section that the failure to execute a written contract shall not void such employment contract. These provisions were inserted in this code section for the first time in the 1961 amendment thereto.

c. The Court finds that these foregoing amendments to 3319.08 were adopted after the decision in *Riegal vs. Holmes,* 14 OO 2d 299, which held in effect that under the Ohio Teachers Tenure Act all teaching contracts of boards of education with teachers holding at least a provisional or temporary certificate must be in writing. This case was decided December 31, 1960. Therefore, the Court finds that this case is not controlling or precedent with respect to the case at hand.

d. The Court also finds that the language "written" and "The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher" was inserted in Ohio Revised Code Section 3319.11 by way of the amendment of 9/8/61 also.

e. Thus, the Court concludes the above analysis clearly demonstrates the legislative intent that a valid contract status between a board of education and a teacher does not require such contract to be in writing or to be executed in order to be binding if other basic contract requirements and obligations are achieved and further, that "writing" and "execution" requirements are at best ministerial. (See *Jacot, Appellee v. Secrest et al., Board of Education of City of Warren, Appellants,* 153 Ohio St. 553 (1950).)

2. The Court finds that the relationship between a teacher and a board of education is contractual and one that is protected against impairment by any state law by Article I Section 10 of the United States Constitution and by the due process clause of the Fourteenth Amendment, subject to the qualification that pertinent state statutes in effect at the time a contract is formed are to be read into it. See *Ludwig v. Board of Education,* 27 OO 359 (1943) (See *Secrest* case also) and 48 O Jur. 2d "Schools" Section 115 at pp. 835-836. Thus, basic concepts of general contract law apply to such contracts subject to statutory enactment.

a. The Court finds that the elemental concepts of "offer" and "acceptance" under Ohio law are defined as follows:

> It is the general rule that an offer, to become a binding contract, must be accepted, without qualification and while the offer is still open and existing, by one having the right to accept, and the acceptance must be communicated to the offeror. Whether an offer is accepted is a question of fact. (See 17 O Jur. 3d "Contracts" section 27 at p. 459.)

b. It is also basic in the law of contracts that an offer may be revoked or withdrawn before acceptance, 17 O Jur. 3d "Contracts" section 24 at page 456; or before the intervention of any legal right. See footnotes 71 and 77 of Section 24 under "Contracts" 17 O Jur. 3d at p. 456.

c. The Court wholeheartedly concurs with the proposition of law set forth in defendant board's brief at 10 thereof citing from *State ex rel. v. The Board of Public Service of Columbus,* 81 Ohio St. 218, at pp. 224-225 to the effect that public boards have a right to reconsider their actions and rescind those contractual in nature. However, this Court finds that this proposition of law is a qualified as the Court in the *Board of Public Service* case pointed out at page 225 as follows:

> But that they are possessed of inherent power to reconsider their action in matters of that nature, and adopt if need be the opposite course *in all cases where no vested right of others has intervened* . . . (italics supplied).

Thus, this Court concludes that the law is clear that a school board's right to rescind its actions is a qualified one and is extinguished in a contractual situation where the board's offer of a limited contract under Ohio Revised Code Section 3319.08 is expressly accepted in writing prior to April 30 of a given calendar year, and prior to an effective rescission under this calendar frame.

4. The Court finds that the matter of salary or salary schedule for the succeeding school year is not an integral or required element of consideration for the formation of a valid limited teaching contract, by April 30 of a given calendar year; nor is it required under Ohio Revised Code Section 3319.08, or by June 1 under Ohio Revised Code Section 3319.11. (See O. R. C. 3319.12.)

5. The Court finds that Ohio Revised Code Section 3313.16 sets forth the procedure to be followed under Ohio Law for the termination of a teacher who has a contract with a board of education.

a. This section of the code also applies to teachers who are under contract or administrators. (See *Rumora v. Board of Education of Ashtabula*, 72 OO 2d 369 (1973).)

6. The Court finds that Ohio Revised Code Section 3313.16 mandates the procedure fo rthe calling of a special meeting by a board of education.

a. It has been held that if such requirements as to notice are not complied with, the proceedings are of no force and any action taken in such a meeting is a nullity. (See 48 O Jur. 2d "Schools" section 75 at p. 772.)

7. The meetings of boards of education are subject to the proscriptions of Ohio Revised Code Section 121.22, more commonly referred to as the "Sunshine Law".

a. Ohio Revised Code Section 121.22(B)(2) provides as follows

> (B)(2) (as used in this section: "Meeting" means any prearranged discussion of the public business of the public body by a majority of its members.

b. Violation of this section in this context would appear to generally require a simultaneous discussion of public business by a majority of the board's members. In this case that would require a simultaneous discussion of public business involving three or more members, and any contact short of that "is insufficient to render invalid the official action of the public body", and thus does not violate Ohio Revised Code Section 121.22(H). See *Hamilton*

Classroom Teachers Association, et al. v. Hamilton City School District, No. CV 78-09-0839 (1979).

8. The measure of damages in a situation where a teacher is wrongfully discharged is the difference between the contract rate or total for the employment period, and the amount of other earnings or income the discharged employee is able to earn in mitigation. See 16 O Jur. 2d "Damages sections 22 and 210 therein. Also See *The Bowling Green Township School District of Licking County v. Preston E. Breese,* 15 CCP-NS p. 497 (1912), particularly syllabus No. 2.

9. Generally, employers that are considered non-profit organizations, as are school boards, and that participate in the state unemployment fund under the reimbursing account method (O. R. C. section 4141.241), are generally entitled to credit for amounts that a wrongfully discharged employee receives from unemployment benefits as against the total amount of employment contract liability as is found to exist at the time such employee is reinstated so long as the employer has made proper notice to the Ohio Bureau of Unemployment Compensation. (See O. R. C. Sections 4141.28(G)(4) and 4141.30(C).)

/s/ Donald R. Ford

The Honorable Donald R. Ford

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO
Case No. 79-CV-571
DR. ETHEL D. MIGRA,
Plaintiff,
vs.
WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Defendants.

OPINION
(Filed March 20, 1980)

This matter came before the Court for trial on the issues joined for declaratory and injunctive relief. The issue of conspiracy was reserved and continued. Thus, the question of individual board member liability is not involved in this opinion.

Statement of Issues

The primary issue presented under the issues joined in this case is whether or not a board of education can legally rescind its action by way of a resolution adopted on April 17, 1979, at a regular board meeting pursuant to Ohio Revised Code Section 3319.08, in which it offered or extended a limited contract for the ensuing school year to a teacher-administrator when the teacher-administrator expressly accepts such offer in writing on April 24, 1979, before the board meets at a special meeting to adopt a resolution to rescind or nonrenew the offer of a limited contract to such teacher-administrator when such action of rescission or nonrenewal occurs before a written contract is prepared and executed by the board and the teacher-administrator?

Other issues related to the foregoing question are:

1. Was the function of Director of the Summer Program under Title VII for the summer of 1979 a substantial element and part of the consideration of the limited contract extended to the plaintiff on April 17, 1979?

2. Did the board properly comply with the requirements of Ohio Revised Code Section 3313.16 by making a proper call and causing effective legal notice of the special meeting scheduled for April 24, 1979, to issue as it relates to the nonrenewal or rescission of plaintiff's limited contract for the 1979-80 school year.

3. Did the contacts and discussions that three of the members of board had, namely Henry Angelo, Barbara Miller, and Catherine Swan, outside of a regular or special meeting or executive session thereof, during the month of April 1979, prior to the special meeting of April 24, 1979, about the renewal or nonrenewal of plaintiff's limited contract for the school year 1979-80 constitute a "prearranged discussion of the public business of the public body by a majority of its members", or a "meeting" (O.R.C. section 121.22(B)(2), and thus violate Ohio Revised Code Section 121.22(H), the Ohio "Sunshine Law"?

4. What compensatory damages, if any, did the plaintiff legally suffer; and if so, what is the measure of such damages?

5. If the plaintiff is entitled to compensatory damages, what duties to mitigate such damages are imposed on the plaintiff, and what tests are to be applied to mitigation requirements, if any?

Conclusion

The basic mechanics of effectuating a contract between a board of education and a teacher-administrator are essentially set forth in Ohio Revised Code Section 3319.08. It is this Court's opinion that this section clearly does not require the creation of a written contract document and its execution or signing as between a board of education and a teacher before the status of a binding legal contract can come into being under the prescriptions of this section, or the general principles of contract law which are not inconsistent with the terms of this section, and which would be applicable. An examination of the legislative history of this section of the revised code and its predecessors clearly indicates to this Court that the holding in *Riegal v. Holmes,* 14 OO 2d 299, which held in effect that under the Ohio Teachers Tenure Act, all teaching contracts of a board of education with teachers holding at least a provisional or temporary certificate must be in writing is no longer operative, controlling, or any form of precedent under this section. The *Riegal* case was decided on December 31, 1960. This particular section was amended effective September 18, 1961, subsequent to the *Riegal* case and for the first time in the first sentence of the first paragraph of this section appeared the word "written" in relationship to contracts. In addition to that, also for the first time the language contained in the second paragraph was inserted which in effect was, "If the board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and a teacher accepts such employment, the failure of such parties to execute a written contract shall not avoid such employment contract." The same type of language was also inserted

at the same time in Ohio Revised Code Section 3319.11 and these insertions have continued in these two statutory sections in all subsequent amendments to them, to and including the last amendments effective August 22, 1973. This Court notes with interest that the Court in the *Riegal* case referred in its decision at page 308 to *Jacot v. Secrest* to buttress its position that the procedure under then existing sections of the revised code resulted in an obligation on the part of a board of education to enter into an actual written contract with a teacher, and that both would be required to sign it before a binding legal contractual status would be reached. The *Riegal* Court's position was in contradiction of "Ohio Attorney General's Opinion No. 6419" under date of April 4, 1956. It is this Court's position that the *Riegal* Court's view represented a misapplication of the logic and holding of the *Jacot v. Secrest* decision, based perhaps on the Riegal Court's zeal to immunize the teacher-defendant in that case from liability.

Interestingly, this Court is of the opinion that the holding and thrust of *Secrest* are most applicable to our present case. Admittedly, it dealt with the interpretation of the predecessor section of Ohio Revised Code Section 3319.11, which again like the predecessor of of 3319.08 contained no language reference to "written", and did not contain express diction eliminating the requirement of executing a written contract. It reached the same result as a matter of analysis of the then existing applicable statutes and general principles of existing contract law. It is this Court's view that Ohio Revised Code Sections 3319.08 and 3319.11, as well as their predecessors, may be read in pari materia so far as their comparative, express language is concerned and the interpretation of same bears

on determining the legislative intent of these sections as to whether or not there is a conditional, concomitant requirement that before a valid, binding contractual relationship between a board of education and a teacher-administrator can be achieved a written contract that is executed must exist. Applying *Secrest* and like authority, and reading the plain language of Ohio Revised Code Section 3319.08, this Court concludes that there simply is no requirement or concomitant condition under Ohio law that a written, executed contract document must exist before there may be a binding contractual relationship between a board and a teacher. Simply stated, the law of Ohio is expressly to the contrary.

Similarly, the Court finds no authority for the argument or proposition that a fixed statement of salary for the following school year is an integral element of consideration for the formation of a valid limited contract by April 20 or June 1 under Ohio Revised Code Sections 3319.08, 3319.11, or 3319.12. With respect to written contracts between school boards and teachers, and the statement of salary schedules after July 1 of a given calendar year under Ohio Revised Code Sections 3319.11 and 3319.12, this Court takes judicial notice of the realities of long standing school board practices in Ohio; that after the board doesn't know until the first part of August, or even September, of each year what the actual roster of teachers will be in a given school year because of resignations, retirements, and reassignments, or what sources of teacher funding will be available, and thus because of both statutory permission and standard practices many school board contracts with teachers are not reduced to writing until after June 1, and/or before August 15, or September 1 of a given year.

It is appropriate next to take up the question of rescission or nonrenewal. The defendant board here cites *State ex rel Owen v. Carrol County Board of Education,* 129 Ohio St. 262, and like authority for the proposition, "When nothing has been accomplished except the adoption of an original resolution by a board of education . . . such action may in good faith be reconsidered or rescinded within a reasonable time." This position is not sufficiently incisive to be dispositive here. This issue in this case is not whether a board of education can rescind a unilateral action. The primary question raised by the facts in this case is whether or not a board of education can effectively rescined a bilateral exercise in which it extended an unconditional offer by resolution under Ohio Revised Code Section 3319.08 that was followed by an express written acceptance by the plaintiff, and was delivered to the defendant board before any action of rescission or nonrenewal was taken by it.

On this point, the defendant board cites *State ex rel v. the Board of Public Service of Columbus,* 81 Ohio St. 218 at 224 in support of its position that it had the right to rescind its action of April 17, 1979, at the special meeting on April 24, 1979. The very language cited by the defendant board from this case contains the basic point of law that is dispositive of this issue on the facts of this case at page 224.

> **That rule, well settled by numerous adjudications, is to the effect that the action of such bodies respecting legislative or administrative matters is not always conclusive and beyond recall, but they are possessed of inherent power to reconsider their action in matters of that nature, and adopt if need be the opposite course *in all cases where no vested right of others has intervened.* . . . (italics supplied).**

It is basic contract law that where an offer has been clearly accepted, involving a legal subject matter and consideration, that vested rights under a contract come into being, and that an attempt to rescind by the offeror after such acceptance can have no legal consequence or effect. Thus, the Court holds that the action of the defendant board on April 24, 1979, was without legal effect.

Defendant-board's contention that *State ex rel. Hura v. Board of Education,* 5 OO 3d 10 (1977) has application here is without merit. The *Hura* case is clearly distinguishable on its facts and application of law. In the *Hura* case, Mr. Hura began work as a teacher with the Brookfield Local School District in September, 1970, under a limited contract status. He obtained his professional teaching certificate on February 24, 1974, and thus became eligible for continuing status for the 1974-75 school year. On April 29, 1974, the Brookfield board passed a resolution under Ohio Revised Code Section 3319.08 to nonrenew Mr. Hura and seven other teachers, which inferentially was communicated in a timely fashion to him by April 30 of that year, which nonrenewals were made a part of the negotiations with the Brookfield Federation of Teachers that year. On May 22, 1974, the board rescinded its action of April 29, and then extended contract offers to Mr. Hura and the other seven teachers for 1974-75, and affirmed that action on May 28, 1974. Mr. Hura later signed a limited contract for the 1974-75 school year and performed thereunder. On April 16, 1975, the local and county superintendents recommended that Mr. Hura be granted a limited contract for the 1975-76 school year, and on April 23rd, the board through its superintendent notified him of its decision. On April 25, the board received a letter from the county superintendent recommending that Mr. Hura not

be re-employed by the board for the 1975-76 school year. On April 28, the board passed a motion rescinding its previous motion and in a timely manner notified Mr. Hura of its nonrenewal. On July 2, 1975, Mr. Hura requested the Eleventh District Court of Appeals to grant a writ of mandamus directing the board to enter into a contract with him based on his claim that he was entitled to continuing service status under Ohio Revised Code Section 3319.11. The Court of Appeals granted the writ on the conclusion that "the action of the board in employing . . . Hura in May of 1974, conferred upon him continuing contract status with the respondent board".

On appeal, the Supreme Court stated succinctly that the issue before it was "whether Hura was entitled to a continuing contract for the 1974-75 or 1975-1976 school years". In holding that he was not entitled to such status, the Supreme Court stated at page 14 that:

> Hura, having taught under a one year limited contract for the 1974-1975 school year, was entitled to a continuing contract for the 1975-1976 school year if he were to be re-employed. However, the board decided, before April 30, 1975, not to re-employ Hura, and provided Hura proper notice of its action. Therefore, Hura had no right to a continuing contract for the 1975-1976 school year.

There is nothing in the *Hura* case to substantiate that Mr. Hura acted in any way to accept the board's proposal of April 23, 1975, with regard to the board's offer of a limited contract of that date (pursuant to Ohio Revised Code Sections 3319.08 and 3319.11) for the 1975-76 school year prior to its action of rescission of the offer of April 23, 1975, on April 28. Therefore, it is in this specific regard that the Hura case is clearly distinguishable on its facts

from the case at hand, as well as the primary principle of contract law involved in this case that was not before the Court in the *Hura* case, and thus it has no express application here.

With respect to plaintiff's claim that she was also entitled to contractual benefits as a Director of Summer Programming for 1979 under Title VII funding, the Court holds that the plaintiff has failed to carry the burden of proof on this issue. The state of the record on this point, particularly the testimony of Mr. Berarducci, Mr. Angelo, and the plaintiff herself clearly shows that this particular function was not an inherent part, or any aspect of the consideration of her limited contract for the 1979-80 school year. In fact, the Court concludes from the evidence that particular role was to be the subject of a separate supplemental contract, and that such supplemental contract never came into existence, nor did it ever issue. The plaintiff has no basis for recovery on this claim.

Ohio Revised Code Section 3313.16 provides the requirements for the calling of a special board meeting. It states that such a meeting may be called by the president or treasurer thereof or by any two members by serving written notice of the time and place of such meeting upon each member of the board at least two days prior to the date of such meeting. The record is clear that Mr. Angelo, the president of the board, called the special meeting of April 24, 1979, within the meaning of Ohio Revised Code Section 3313.16, which further specifically provides:

> Such notice must be signed by the official or members calling the meeting.

It is equally clear from the face of Joint Exhibit B, the notice of the special meeting, that Mr. Angelo failed

to sign it. The record is also unequivocal in manifesting that board member, James Culver, did not receive a copy of the written notice of this special meeting until after his return from the National School Board's convention in Miami, Florida, which occurred on April 25, 1979. The testimony of all witnesses on the subject of Mr. Culver's intention to attend the convention was substantially the same—that he planned to leave near the end of the week of April 15, 1979, and that by inference he would obviously not be physically in Warren on some of those days immediately preceding April 24.

Mr. Culver did testify that he did receive oral notice of this special meeting by way of a call from Carol Hall, Mr. Berarducci's secretary, on the 19th of April, but he stated that in this phone message from her she indicated to him that the special meeting of the 24th would only involve the matter of the administrator, Mr. Cokrlic. This was not contradicted by any other evidence. Thus, the requirement of prior written notice on Mr. Culver under Ohio Revised Code Section 3313.16 was not fulfilled.

The record indicates that many of the initial informal communications concerning the purpose for the special meeting made by administrative officers indicated that it was called to take up only Mr. Cokrlic's situation, although later contacts with certain board members indicated the plaintiff's status would be brought up again. The agenda for that meeting was silent on this subject, although admittedly the agenda included the standard legerdemain of "new business". *Drury's Ohio School Guide Third edition,* at section 3.62, page 67 thereof under the topic "Special Meetings" makes the following observation on this subject:

> While the statute is silent as to whether the written notice shall state the purpose of the special meeting, it would seem to be better practice if the notice indicates with clearness and particularity the business to be transacted in order that the members of the board may fairly understand the purpose for which they are to be convened. In some jurisdictions, the Courts have held such to be necessary.

Query, what is the effect of a failure to comply with the calling criteria found in the code? With respect to this question as it bears on the requirements for calling a special meeting under Ohio Revised Code Section 3313.16, 48 O Jur. 2d, under the topical subject, "Schools", section 75 under the sub-topic, Time, Calling and Place of Meetings, page 772 provides:

> It has been held that if such requirements as to notice are not complied with, the proceedings are of no force and any action taken in such a meeting is a nullity.

This Court would indicate that the foregoing conclusion is subject to certain embellishments and qualifications as a result of certain case holdings on this subject in Ohio. Enhancing technocracy is not a judicial goal of this Court; however, in view of the fact that the officer of the board who called this meeting failed to sign the required notice in a proper manner, the lack of a proper written notice being served on board member, James Culver, in a timely fashion, the general ambiguity involved in communicating the purpose of this meeting to board members, the news media, and the public at large, and the totality of circumstances surrounding the call of this special meeting, this Court finds a significant and substantial failure to comply with Ohio Revised Code Section 3313.16. Thus, respecting

this issue, the Court holds that any action taken by the defendant board at this meeting was null and void.

The plaintiff also contends that the action by the defendant board at the special meeting of April 24, 1979, was also invalid because a majority of the board members had violated certain provisions of Ohio Revised Code Section 121.22, commonly designated as the "Sunshine Law". Obviously, meetings of governmental bodies under this law are to be public, unless they fall within the parameters of one of the express exceptions of this section. There is no doubt that school boards fall within the purview of this law.

Ohio Revised Code Section 121.(B)(2) provides:

> "Meeting" means any prearranged discussion of the public business of the public body by a majority of its members.

Ohio Revised Code Section 121.22(H) in part contains the following proscription:

> A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) of this section. . . .

Hence, the basic question raised under this contention is whether the contacts that obtained prior to April 17, and before April 24, between board members Henry Angelo, Catherine Swan, and Barbara Miller outside of a regularly scheduled special meeting of the board constitute a "prearranged discussion of the public business of the public body by a majority of its members", or a "meeting" that violated Ohio Revised Code Section 121.22(H).

The record reflects that board members Angelo, Swan, and Miller did not engage in open discussion regarding plaintiff's contract status for the school year 1979-80 in the executive session preceding the regular board meeting of April 17, 1979. There is also no doubt about the fact that there were separate contacts and discussions about this subject prior to April 17 and after April 17 until April 24 as between board president, Henry Angelo and Mrs. Swan, and separately as between Mr. Angelo and Mrs. Miller. The Court finds, however, that there was never an occasion during the foregoing time intervals when these three board members met together simultaneously, away from a regular or special board meeting and discussed and/or deliberated the subject of plaintiff's contractual status for the 1979-80 school year.

This Court's view of this law is that for such contacts between board members to pass beyond the threshold and become violative of inhibitions of the "Sunshine Law" would require a simultaneous discussion or deliberation of public business by a majority of the board; that is, relating these proscriptions to this case would require that there would be a showing that there was a concurrent discussion of this public business by three or more board members. It is this Court's opinion in interpreting this section of the code that any contact as between board members short of that number and not of that fabric "is insufficient to render invalid the official action of the public body". **The Court holds that the contacts between these three members are described above did not violate Ohio Revised Code Section 121.22(H). (See *Hamilton Classroom Teachers Association, et al. v. Hamilton City School District*, No. CV 78-09-0839 (1979).)**

The dispute in this case can perhaps be best "kernelized" in this syntax. This was not a situation that projected an interpretation of what the defendant school board had the right and power under the law to do, but rather one of analyzing the consequences of what the board did in fact do.

The Court concluded that the plaintiff had a valid limited contract with the defendant board for the 1979-80 school year, and that the efforts by a majority of the defendant board to rescind and nonrenew the plaintiff's contract were improper and without legal effect, and further finds that the plaintiff is entitled to compensatory damages and the equitable relief requested. The Court further finds that the plaintiff's efforts to mitigate were reasonable.

Therefore, it is ORDERED, ADJUDGED, and DECREED that the plaintiff is entitled to be immediately reinstated to the position of supervisor of elementary education for the balance of the 1979-1980 school year pursuant to the terms of her limited contract; that the defendant board and/or any of its officers, administrators, employees, or agents are restrained from preventing the plaintiff from performing all of her duties and responsibilities under her contract; and that she recover as compensatory damages the amount owing to her under her contract at the contract rate of $26,010.00, less the sum of money received by her to date from unemployment compensation, for which the defendant board is to receive credit against the total amount owing under the contract

at the contract rate. The matter of cost apportionment is continued.

/s/ Donald R. Ford

The Honorable Donald R. Ford
Judge Court of Common Pleas
Trumbull County, Ohio

PLAINTIFF'S EXHIBIT A

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO
CIVIL DIVISION
Case No. 79 CV 571
DR. ETHEL MIGRA,
Plaintiff,
vs.
WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Defendants.

MOTION TO DISMISS

Now comes the plaintiff, Dr. Ethel D. Migra, and moves the Court to dismiss, without prejudice, the instant cause wherein the issue of the conspiracy and individual board member liability therefore is presently pending herein.

/s/ John R. Vintilla

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PLAINTIFF'S EXHIBIT B

IN THE COURT OF COMMON PLEAS

Case No. 79-CV-571

County of Trumbull)
) ss.
State of Ohio)

DOCTOR ETHEL D. MIGRA,

Plaintiff,

vs.

WARREN CITY SCHOOL DISTRICT, BOARD OF EDUCATION, et al.,

Defendants.

JUDGMENT ENTRY

(Filed July 9, 1980)

Matter before the Court on Plaintiff's application to dismiss, without prejudice, the second cause of action contained in her original complaint, which raises the general issue of conspiracy, and which was reserved by the Court by prior order, and, thus, is not the subject of an appeal before the Eleventh District Court of Appeals in Case Number 2860 therein. Therefore, the Court finds that it has jurisdiction to rule on this motion.

MOTION GRANTED.

/s/ Donald R. Ford
Judge Donald R. Ford

DATE: 6-9-80.

No. 82-738

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL MIGRA,
Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the docrine of res judicata bar a second action in federal court under 42 U.S.C. Section 1983 for redress of a First Amendment claim where a prior state court action between the same parties and based on the same operative facts as the state court claims determined all the issues raised, and the state court was a court of competent jurisdiction to determine a First Amendment claim if such claim had been raised therein?

LIST OF ALL PARTIES

Petitioner: Dr. Ethel D. Migra

Respondents: Warren City [Ohio] School District Board of Education

Catherine O. Swan
Henry J. Angelo
Willard T. Reuben
Raymond Tesner
Mary Wilheim
Barbara Miller

[Individual Board Members]

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STATEMENT OF THE CASE

The following is submitted to supplement the statement of the case offered by petitioner, Dr. Ethel D. Migra.

STATE COURT ACTION:

Petitioner's contract of employment with the respondent, Warren City School District Board of Education (hereinafter Board),was renewed on April 17, 1979 as a courtesy to petitioner and on the sole premise that petitioner would immediately thereupon submit her resignation, which she did not do. When it became apparent to the Board that petitioner would not do as represented, it took action on April 24, 1979, prior to the statutory deadline, to non-renew her contract of employment.

When petitioner had learned of the date of the meeting at which the Board intended to non-renew her contract (April 24, 1979), she consulted an attorney. After such consultation, and on the advice of counsel, petitioner sent a purported letter of acceptance of the Board's first resolution renewing her contract of employment to the Superintendent of Schools. This letter (which was back-dated to April 18, 1979) was delivered to the Superintendent prior to the April 24 meeting. Nevertheless, the Board non-renewed petitioner's contract of employment and notified her prior to the statutory deadline of April 30.

The state court complaint contained five causes of action: (1) illegal non-renewal of an employment contract; (2) anticipatory breach of contract; (3) conspiracy of the individual Board members to deprive plaintiff of contract rights; (4) violation of Ohio's "Sunshine Law";

and (5) conducting a public meeting not called pursuant to law. After trial, the state court found that petitioner had a valid contract of employment, that the meeting of April 24, 1979 wherein petitioner's contract was non-renewed was an illegal meeting due to the technical failure of the notice requirements of Ohio R.C. Section 3313.16, and that Ohio's "Sunshine Law" (Ohio R.C. Section 121.22) had not been violated by the Board. The state court did not rule on conspiracy charges alleged against the individual defendants, a claim that was later voluntarily dismissed by petitioner on July 2, 1980.

In finding for the petitioner and against the Board on the contract claim, the state court said:

> [T]he relationship between a teacher and a board of education is contractual and one that is protected against impairment by any state law by Article I Section 10 of the United States Constitution and by the Due Process Clause of the Fourteenth Amendment, subject to the qualification that pertinent state statutes in effect at the time a contract is formed are to be read into it.

No claims or findings of First Amendment violations were made in the state court proceeding.

FEDERAL ACTION:

On July 10, 1980, petitioner filed the instant suit in federal court under 42 U.S.C. Sections 1983 and 1985 against the same parties to the state court suit and arising out of the same facts and circumstances as the state claim. In this suit, petitioner alleged, in addition to the facts set forth in the state claim, that her First Amendment rights were violated by the conduct of the Board and the individual defendants.

The district court held that all petitioner's federal claims were barred by the doctrine of res judicata. (See Appendix to Petition for Certiorari at C-17 et seq.) This decision was summarily affirmed by the Sixth Circuit. (Id. at A-15).

SUMMARY OF ARGUMENT

The doctrine of res judicata is applicable to Section 1983 actions, *Allen v. McCurry*, 449 U.S. 90 (1980). Thus, where a state court has determined between the same parties Fifth and Fourteenth Amendment property and due process rights regarding an employment contract, as well as statutory rights relative to notice requirments of meetings of boards of education, res judicata will bar petitioner's same claims between the same parties set forth in a federal court Section 1983 action, including First Amendment claims that could have been raised in the state action but were not.

ARGUMENT

In *Montana v. United States*, 440 U.S. 147, 153 (1979), this Court held that under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." In *Allen v. McCurry*, 449 U.S. 90 (1980) this Court again defined res judicata, stating:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action. *Cromwell v. County Sac.*, 94 U.S. 351, 352, 24 L. Ed. 195.

449 U.S. at 94 (emphasis added).

In the case at bar, there have been two actions, between parties and privies, one of which has gone to judgment in state court and the other which is in federal court and now before this Court. The cause of action in both, however, is singular, has been disposed of by the state court. Thus, petitioner's claims are now barred in federal court by the docrine of res judicata.

Petitioner argues that the issues in the state court action are not the equivalent of the issues she raises in her Section 1983 federal claim and that the doctrine of res judicata is, therefore, not applicable. The record in this case, however, indicates to the contrary. The record also reveals that all issues but petitioner's First Amendment claim were disposed of by the state court, and that such court could have decided the First Amendment claim had it been raised. *Deane Hill Coutry Club, Inc. v. City of Knoxville*, 379 F.2d 321, 325 (6th Cir. 1967), *cert. denied*, 389 U.S. 897.

Petitioner's reliance on *Allen v. McCurry*, 449 U.S. 90 (1980) is somewhat bewildering, for the majority opinion of the Court in that case rejected any arguments that the principle of res judicata did not apply to Section 1983 actions, and stated:

> Because the requirement of mutuality of estoppel was still alive in the federal courts until well into this century . . ., the drafters of the 1871 Civil Rights Act, of which section 1983 is a part, may have had less reason to concern themselves with rules of preclusion than a modern Congress would. Nevertheless, in 1871 res judicata and collateral estoppel could certainly have applied in federal suits following state court litigation between the same parties or their privies, *and nothing in the language of section 1983 remotely expresses any congressional intent to contravene the common law rules of preclusion .... Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.*
>
> *Moreover, the legislative history of section 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion.* The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States ..., and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in

> protecting federal rights .... But in the context of the legislative history as a whole, this congressional concern lends only most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to overide section 1738 [the "full faith and credit" statute] or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored ..., much clearer support then this would be required to hold that section 1738 and the traditional rules of preclusion are not applicable to section 1983 suits.

449 U.S. at 97-99 (emphasis added) (citations omitted). The *Allen* court definition of res judicata cited the Supreme Court case of *Cromwell v. County Sac*, 94 U.S. 351, and defined res judicata as precluding not only issues which were raised in a prior action but also those issues which *could have been* raised in that action. 449 U.S. at 94. This is in accord with the Sixth Circuit's holdings in *Coogan v. Cincinnati Bar Assn.*, 431 F.2d 1209 (6th Cir. 1970), *cert. denied*, 401 U.S. 939, and *Mayer v. Distel Tool and Machine Co.*, 556 F.2d 798 (6th Cir. 1977).

Other circuit courts are in accord with the proposition that res judicata applies in section 1983 cases to constitutional issues which could have been raised in prior litigation between parties but were not. In the Eighth Circuit case of *Robbins v. District Court*, 592 F.2d 1015, 1017-18 (8th Cir. 1979) the court said:

In *Green v. American Broadcasting Companies, Inc.*, 572 F.2d 628, 632 (8th Cir. 1978) we held that an issue may not be relitigated in a second lawsuit where that issue had previously been litigated in a prior lawsuit which involved the same cause of action. *Furthermore, issues which might have been raised in the first lawsuit may not be raised in a second lawsuit arising out of the same cause of action.*

. . .

While *Green v. American Broadcasting Companies, Inc., supra,* did not involve constitutional issues, this circuit and several other circuits have held that the principle of *res judicata* applies to section 1983 actions and *operates as a bar to the relitigation of constitutional issues actually raised as well as to constitutional issues that could have been raised in a prior lawsuit if the second suit concerns the same operative nucleus of fact. Goodrich v. Supreme Court of South Dakota,* 511 F.2d 316, 318 (8th Cir. 1975); *Jenson v. Olson,* 353 F.2d 825, 827 (8th Cir. 1965); *Rhodes v. Meyer,* 334 F.2d 709, 716 (8th Cir. 1964); *Scoggin v. Schrunk,* 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657 (1976); *Blankner v. Chicago,* 504 F.2d 1037, 1042 (7th Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1678, 44 L.Ed.2d 101 (1975); *Lovely v. Laliberte,* 498 F.2d 1261, 1263 (1st Cir.), *cert. denied,* 419 U.S. 1038, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974). (Emphasis added.)

Accord, Spence v. Latting, 512 F.2d 93, 98 (10th Cir. 1975), *cert. denied*, 423 U.S. 896.

In the state court proceeding, petitioner had every opportunity to raise and litigate the constitutional claims which she has raised in this action. The state and federal courts have concurrent jurisdiction to hear and decide constitutional issues. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-508 (1962); *see also Jackson v. Kurtz*, 65 Ohio App. 2d 152, 156 (1979) (Ohio courts have concurrent jurisdiction of Section 1983 claims). Specifically, Ohio Revised Code Section 2305.01 and Article IV of the Constitution of the State of Ohio provided the Common Pleas Court with jurisdiction over petitioner's federal claims.

In light of the foregoing, respondents respectfully submit that petitioner, having had the opportunity to litigate her federal claims in the courts of Ohio, and having failed to do so, is now precluded from litigating these claims in a new action in federal court. The decision of the United States District Court and the Sixth Circuit Court of Appeals to apply traditional claim preclusion concepts in this Section 1983 action was sound and well-reasoned, and should be affirmed by this Court.

CONCLUSION

In light of the foregoing, it is clear that the doctrine of res judicata is applicable in the federal courts to bar claims under 42 U.S.C. Sections 1983 and 1985 which could have been litigated in a prior state court proceeding between the same parties, but were not.

Respondents Warren City School District Board of Education and individual board members Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim, and Barbara Miller accordingly urge most strongly upon this Court that it deny the petition for writ of certiorari filed herein.

Respectfully submitted,

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No. 82-738

In The

Supreme Court of the United States

October Term, 1982

DR. ETHEL D. MIGRA,

Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Where the only issue judicially acted upon and decided by a state court involved the breach of a teacher's employment contract, is the prevailing teacher precluded from instituting a civil rights suit in the federal court under 42 U. S. C., Sections 1983 and 1985, against the Board of Education and its members—state court defendants?

2. Where a teacher is terminated without a hearing in violation of the contract of employment, under circumstances implicating her good name, reputation, honor or integrity, does the federal court have jurisdiction of a civil rights action to vindicate the teacher's liberty and property interests as secured to her by the Fourteenth Amendment?

3. Whether parties to a state court action could raise the defense of res judicata or collateral estoppel in a civil rights suit involving federal claims that were not raised and did not arise in the earlier action, although they could have been submitted and litigated under the concurrent jurisdiction of the state court?

PARTIES TO PROCEEDING

The parties to this proceeding are those contained in the caption of the case, to-wit: Dr. Ethel D. Migra, The Warren City School District Board of Education, Catherine O. Swan, Henry J. Angelo, Willard T. Reuben, Raymond Tesner, Mary Milheim, Barbara Miller, and Robert Peques.

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No. 82-738

In The

Supreme Court of the United States

October Term, 1982

DR. ETHEL D. MIGRA,

Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The court of appeals did not render an opinion. The opinion of the district court (Pet. App. pp. C-17 - C-31) is not reported.

JURISDICTION

The order of the court of appeals (Pet. App. p. A-15) was entered on June 3, 1982. A petition for rehearing with a suggestion for rehearing *en banc* was denied on July 27, 1982 (Pet. App. p. B-16). The petition for a writ of certiorari was filed on October 19, 1982, and was granted on January 10, 1983. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

STATEMENT

This suit was filed in the district court pursuant to Sections 1983 and 1985 of Title 42 of the United States Code, and the jurisdictional counterpart, 28 U. S. C., Sections 1331 (a) and 1343 (3) to vindicate the deprivation of the constitutional rights of Dr. Ethel D. Migra, petitioner herein, under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The defendants in the action are the Warren City School District Board of Education and certain individuals who were members of the Board at the time relevant hereto and others, including the superintendent of the school district, respondents herein.

Petitioner, Dr. Migra, had been an employee of the Warren City School District Board of Education (hereinafter Board) ever since August, 1976, and until the occurrence of the events which have given rise to the instant suit. She was employed as a supervisor of elementary education for the school district on a yearly basis. On

April 17, 1979, at the regular meeting of the Board, with all five members present, a resolution was adopted unanimously to renew the employment of Dr. Migra for the ensuing school year of 1979-1980 (App. p. 30). One week thereafter, on April 24, 1979, the Board held a special meeting at which it rescinded its resolution of April 17, 1979, to renew the petitioner's contract of employment by a vote of three to one (App. pp. 31, 32). The fifth member of the Board, a Mr. Culver, was not notified that the special meeting would reconsider Dr. Migra's employment, and he did not receive written notice of the special board meeting of April 24, 1979. Culver learned for the first time, after he returned from Miami, Florida, on April 25, 1979, where he attended a National School Boards Convention as a delegate of the Board (App. pp. 31, 47, 48), that the special meeting had dealt with and had terminated Dr. Migra's employment. Prior to the special meeting of April 24, 1979, wherein the Board resolved to terminate the petitioner's employment, the petitioner had accepted the April 17, 1979, resolution of the Board to continue her employment (App. pp. 30, 31).

As a result of the termination of the employment, the petitioner brought suit in the Common Pleas Court of Trumbull County, Ohio, against the Board and the members who voted to terminate her employment. The complaint asserted, in essence, two causes of action, namely, (1) breach of the employment contract by the Board, and (2) the wrongful interference by the individual members of the Board with the petitioner's contract of employment (App. p. 25).

At the trial of the action, the state court sua sponte "reserved and continued" the petitioner's claim of con-

spiracy and only adjudicated the issue regarding the validity of the petitioner's termination by the Board. The court did not try the tort liability claim against the individual members of the Board (App. p. 39). Following a bench trial, the state court adjudged and decreed that the April 24, 1979, special meeting was invalid and of no force and effect (App. pp. 49, 50), that the petitioner had duly accepted the April 17, 1979, resolution to continue her employment (App. pp. 30, 31), that the acceptance constituted a binding contract between the petitioner and the Board (App. pp. 33, 34, 35, 36, 43), and that the Board's action terminating the petitioner was contrary to law (App. pp. 44, 45, 49, 50). Subsequently, the state court dismissed the tort claim against the individual respondents without prejudice at the petitioner's request (App. pp. 53, 54).

On July 10, 1980, the petitioner filed the instant action against the respondents in the United States District Court for the Northern District of Ohio (App. pp. 3-12), and, in due course, the respondents filed their answers to the complaint (App. pp. 13, 16). Shortly, thereafter, the respondents submitted motions for summary judgment on the basis of res judicata and the statute of limitation (App. pp. 21, 22, 23). The district court granted summary judgment for the respondents and dismissed the complaint (Pet. App. pp. C-17-31, D-32). The district court also dismissed the petitioner's claim of entitlement to continued employment for failure to state a claim upon which relief may be granted (Pet. App. p. C-31). The Sixth Circuit Court of Appeals, in a one-page order, affirmed the judgment below (Pet. App. p. A-15). The petition for rehearing with a suggestion for an *en banc* hearing was also denied (Pet. App. p. B-16).

SUMMARY OF ARGUMENT

I. In *Allen v. McCurry,* (1980) 449 U.S. 90, this Court declared that the doctrines of res judicata and collateral estoppel apply to actions filed pursuant to 42 U.S.C., Section 1983. Allen dealt solely with the traditional principle of "collateral estoppel," or, as it is also referred to, "issue preclusion." Generally stated, collateral estoppel bars a party from contesting in a subsequent proceeding any issue of fact actually litigated and determined by a previous final judgment rendered by a court of competent jurisdiction. *Montana v. United States,* 440 U.S. 147, 153. The Court in Allen declared that ". . . [T]he federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel."

Res judicata, otherwise referred to as "claim preclusion," is the basis given for the decision below. The conventional elements of the doctrine of res judicata are generally stated to be: (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suits; and (3) an identity of parties or their privies in the two suits.

The essential element of res judicata which emerges from the earliest of cases and which is critical to the determination of the present case is that the cause of action or claim must be the same as that in which the judgment had been rendered. The courts and commentators alike are agreed that under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. A final judgment is a judgment which brings a suit to conclusion. It is the judgment

which bars recovery in any other litigation between the same parties on the same claim or cause of action.

Allen and also the later case of *Kremer v. Chemical Construction Corp.*, — U. S. —, 102 S. Ct. 1883 (1982), both relied on 28 U. S. C., Section 1738, which requires federal courts to give the same conclusive effect to state court judgments "as they have by law or usage in the courts of such state." Ohio adheres to this traditional rule of res judicata, 32 O. Jur. 2d, *Judgments,* Sections 225, 226; *Norwood v. McDonald,* 142 Ohio St. 299 (1943); *Trautwein v. Sorgenfrei,* 58 Ohio St. 2d 493 (1979). If the claim or cause of action sued on in the state court involves non-federal matters, the judgment of the state court is not "on the merits" as to the federal claims subsequently brought in federal court; and, therefore, the bar of res judicata is not applicable in the federal action.

II. The federal suit alleges that the respondents conspired to deprive the petitioner of the rights guaranteed by the Constitution of the United States, for which deprivation she seeks relief under 42 U. S. C., Sections 1983 and 1985. The First Amendment and Fourteenth Amendment claims would not be barred under the traditional doctrine of res judicata due to the difference in the causes of action in the two cases. The pivotal question relative to such allegations is whether the circumstances of the discharge of the petitioner, whereby she lost her position of employment, so blackened her name as to impair the liberty interest in her good name, reputation, honor and integrity and in her professional reputation. A civil rights plaintiff has a due process right not to be subjected to defamatory and stigmatizing public charges which occurred in the "course of his discharge," without being afforded the right to a

"name-clearing hearing." *Owens v. City of Independence,* 445 U. S. 622 (1980); *Codd v. Velger,* 429 U. S. 631; *Board of Regents v. Roth,* 408 U. S. 564 (1972); *Perry v. Sinderman,* 408 U. S. 593 (1972). The district court characterized the allegations implicating the liberty interest of the petitioner in this respect as being an action in defamation that "arises from the same claim and set of circumstances which were litigated in the state court, and, therefore, the claim is barred both by res judicata and by the statute of limitations."

Ohio law regards the conspiracy for an unlawful purpose, rather than the slander, to be the substantive ground of recovery. Ohio follows the generally accepted doctrine that persons uttering slanders in pursuance of a conspiracy to slander, and all other members of the conspiracy as well, may be held jointly liable. In Ohio, therefore, the conspiracy action is not barred by the statute applicable to libel and slander. 34 O. Jur., *Libel and Slander,* Section 129; *Zurhorst v. Kroll,* 10 OCC (NS) 228; *Slavinas v. Ambrose,* 27 NP (NS) 279; *Schoedler v. Gauge & E. Co.,* 134 Ohio St. 78.

ARGUMENT

The adjudication by a state court of an action based on the statutes and the common law of the state does not bar a civil rights action in federal court between the same parties on matters that were not litigated and which were not essential to the issues or points in controversy in the state court.

Throughout the argument we shall refer to the decision of the district court inasmuch as the circuit court of

appeals adopted the decision in toto without rendering an independent opinion.

The principle issue in this case is whether the traditional doctrine of res judicata bars the petitioner from instituting a civil rights action in the federal court pursuant to 42 U. S. C., Sections 1983 and 1985, by reason of a former action between the same parties in the state court which involved and was adjudicated upon statutory and common law issues. The district court determined that the petitioner's claims in the instant action could have been fully litigated between the parties in the state court action, and that, therefore, the petitioner is barred from asserting them in the present case.

It is important to note that the district court applied the bar of res judicata to all the federal claims of the complaint, with the exception of the claim regarding the denial of employment to the petitioner beyond the 1979-1980 school year. As to that claim, the court found that the complaint fails to state a claim for relief.

In order that the decisions below may be viewed in the proper perspective, it is necessary to consider carefully the traditional doctrine of res judicata. A succinct statement of the principle is to be found in the authoritative text, *Freeman on Judgments,* Fifth Ed., Vol. 2, Section 627, page 1323, wherein the author declared:

> As stated by Lord Chief Justice de Grey in the Duchess of Kingston's Case, which has been quoted innumerable times, *"the judgment of a court of concurrent jurisdiction, directly upon the point,* is as a plea, a bar, or as evidence, *conclusive between the same parties upon the same matter, directly in question in another court;* secondly, *that the judgment* of a court of exclusive jurisdiction *directly upon the point* is, in like

> manner, conclusive *upon the same matter* between the parties, coming incidentally in question in another court, for a different purpose. (Italics ours.)

Moore's Federal Practice, Second Edition, states the principles underlying res judicata at page 621 in Volume 1B, as follows:

> The term *res judicata* is often used to denote two things: (1) that such a judgment, *when rendered on the merits,* is an absolute bar to a subsequent action, between the same parties or those in privity with them, *upon the same claim or demand;* and (2) that such a judgment constitutes an estoppel between the same parties or those in privity with them, as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different. *Under the first proposition the judgment operates as a bar—prevents relitigation of all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment, in relation to the same claim—regardless of whether all grounds for recovery or defenses were judicially determined.* Under the second proposition the judgment prevents the parties from relitigating only those matters that were determined. (Italics ours.)

The principle which governs the preclusion issue in the present case, wherein the second action between the parties is upon a different claim, was enunciated in *Mercoid Corporation v. Mid-Continent Co.,* 320 U. S. 661, 671:

> The case is governed by the principle that *where the second cause of action between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered* "but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac,* 94 U. S. 353, 354. *Russell v. Place,* 94 U. S. 606. (Italics ours.)

Cromwell v. County of Sac, 94 U. S. 351 (1876), is the leading American case on the subject of res judicata and collateral estoppel. After illustrating the difference in the two principles—res judicata and collateral estoppel—the Court defined the basic criteria inherent in the preclusive effect of res judicata. Since we believe that the *Cromwell* definition is crucial to the proper determination of the preclusion question before this Court, we invite the Court's attention to the declaration at page 353, as follows:

> The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.* (Italics ours.)

Thus, Cromwell sets forth the proper application of the statement that a judgment estops not only the issue actually presented in the action, but also every issue which

might have been presented. This statement is often misconstrued and misapplied by the courts. *Coogan v. Cincinnati Bar Ass'n.*, 431 F. 2d 1209 (6 Cir. 1970); *Lee v. City of Peoria*, 685 F. 2d 196 (1982). According to Cromwell, such a statement is "strictly accurate" only "when applied to the demand or claim in controversy." Or, as stated by this Court in Mercoid Corporation, a prior judgment is conclusive *in an action between the same parties on a different claim*, "not as to issues which might have been tendered, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Applying Cromwell and Mercoid to the facts and circumstances of the instant case, it becomes evident that the only claim or demand that the petitioner is precluded from bringing against the respondents is the claim or demand which had been in controversy and upon which the state court rendered judgment. The state court action involved the single claim that the discharge of the petitioner was accomplished contrary to the statutory and common law of Ohio. This claim is the only one which had been litigated and which had passed into judgment in the prior action in the state court. The judgment on such a claim constitutes the bar to a subsequent action between the same parties. It is the claim upon which the judgment was rendered that may not be relitigated in a second action between the same parties. Thus, the crucial consideration regarding res judicata is whether the claim or demand of the second action between the same parties is predicated upon a different claim or demand from that which had been controverted and passed into judgment in the earlier case.

The record herein clearly demonstrates that the federal claims of the within cause had not been in controversy and did not pass into judgment in the state court action between the parties in the federal court. The two cases involve distinct causes of action and were intended to address different types of wrongdoing.

The only rule which emerges from *Allen v. McCurry* is that Section 1983 presents no categorical bar to the application of res judicata and collateral estoppel concepts. 449 U. S. at 97, n. 10. However, nothing in Allen, or other decisions of this Court which we could find on the subject, requires a departure from the fundamental precept of res judicata—that the subsequent suit must involve the same cause of action, and that the bar is applicable only as to those claims or demands which were in controversy and upon which the determination of the judgment was rendered in a prior action. Where there has not been a judicial determination by the state court on the merits of the specific claims in the federal complaint, a plaintiff's action will not be barred by res judicata. If the legal matters determined in the earlier case differ from the issues raised in the second case, then, clearly, res judicata has no bearing on the situation. The author of *Black's Law Dictionary,* Fifth Edition, correctly and precisely defines the legal connotation of *res judicata* as follows:

> **A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.**

> And to be applicable, requires identity in thing sued for as well as identity of cause of action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided. (Citations omitted.)

This rule was reiterated by Justice Brennan in *Kremer v. Chemical Construction Corp.*, — U. S. —, n. 22, 102 S. Ct. 1883, 1887 (1982), as follows:

> It is a basic principle of the preclusion doctrine (citations omitted), that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision.

The record in this case makes it abundantly clear that the elements of a civil rights action, as contained in the federal complaint, are not identical or relevant to the issues which led to the state court judgment.

The fundamental question is: Was the issue or were the issues decided in the prior adjudication identical with those presented in the present suit? Stated otherwise: Were the federal claims judicially acted upon or decided? Were they settled by the state court judgment? In the state court, petitioner asserted and litigated the right to continued employment by reason of the laws of Ohio. Following a bench trial, the state court adjudged and decreed that the petitioner had a binding contract of employment which had been breached by the Board, resulting in damages to the petitioner.

The state court complaint also asserted a common law claim of conspiracy against the individual defendants which the state court, sua sponte, "reserved and continued" at the outset of the trial. This claim was subsequently dismissed without prejudice. Thus, in allowing the volun-

tary dismissal without prejudice of the tort claim, the state judge expressly reserved the petitioner's right to maintain the second action. The issues adjudicated in the Common Pleas Court of Trumbull County, Ohio, are not at all the equivalent of a Section 1983 proceeding. Therefore, it is clearly evident, we believe, that the constitutional claims of the present action are not barred. The state claim which was dismissed was for illegal interference and conspiracy to interfere with petitioner's employment. The tortious acts of the respondents furnish the grounds for the violation of the petitioner's constitutional rights as charged in the complaint. Whether these wrongful acts subject the respondents to liability under the Civil Rights Act, 42 U. S. C., Section 1983, is no longer in dispute, as a result of the decisions of the Court. In this connection, the Court in *Carey v. Piphus,* (1978) 435 U. S. 247, 253, declared:

> The legislative history of Section 1983 . . . demonstrates that it was intended to "create a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured to them by the Constitution."

Ohio follows and adheres to the traditional doctrine of res judicata as expressed by the common law and enunciated by this Court in Cromwell v. County of Sac, 94 U. S. 351.

The Full Faith and Credit Act, 28 U. S. C., Section 1738, requires the federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged. *Kremer v. Chemical Construction Corp.,* — U. S. —, 102 S. Ct. 1883, 1889; *Allen v. Mc-*

Curry, 449 U. S. 90, 94. In Kremer this Court explained that the words of the Full Faith and Credit Act are to be taken at face value, to wit:

> It has long been established that Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beycnd the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken.

The Ohio rule on res judicata and collateral estoppel is expressed in *Norwood v. McDonald*, (1943) 142 Ohio St. 299, and *Whitehead v. General Tel. Co.*, (1969) 20 Ohio St. 2d 108. These decisions represent the generally accepted and traditional views on preclusion as we have shown herein. Paragraphs 1 and 2 of the syllabus in Whitehead state:

> 1. A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is *res judicata* as between the parties or their privies. (Paragraph No. 1 of syllabus of *Norwood v. McDonald*, 142 Ohio St., 299, approved and followed.)
>
> 2. A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, *a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies.* The prior

> judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. (Paragraphs Nos. 2 and 3 of the syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.) (Emphasis of the Court.)

The Supreme Court of Ohio had occasion to review and to reaffirm Norwood and Whitehead in *Trautwein v. Sorgenfrei*, (1979) 58 Ohio St. 2d 493.

The critical language of the res judicata rule as applied in Ohio is that "a final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter." It is imperative that there be an identity of the cause of action or claim in the subsequent suit with that of the prior action. The district court assumed that the cause of action in the within case is identical with the cause of action in the state court suit between the parties, simply because both cases relate to the same subject matter involving the Board and certain members thereof. However, even though the two cases relate to the same subject matter, they are separate causes of action. *Jones v. Petruska*, (1979) 13 O. O. 3d 111. The state court action was adjudicated upon the statutory law of Ohio and the common law issue of breach of contract, whereas our case is a civil rights action which is predicated on federal claims under Sections 1983 and 1985 and the Constitution of the United States.

The doctrine of res judicata also embraces the policy that a party must make good his cause of action or establish his defenses, ". . . by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the

correctness of the determination nor relitigate the same matters between the same parties." *Covington & Cincinnati Bridge Co. v. Sargent,* (1875) 27 Ohio St. 233. The petitioner is not seeking to deny the correctness of the state court judgment, nor is she seeking to relitigate the same matters which have been adjudicated by, or could have been litigated in, the state court. Admittedly, a party cannot escape the preclusive effect of res judicata by asserting his own failure to raise matters clearly within the scope of the prior proceeding.

The statement of the Fifth Circuit in *Exhibits Poster Exch., Inc. v. National Screen Service Corp.,* (1970) 421 F. 2d 1313, is especially appropriate in consideration of res judicata regarding this particular controversy. The court said:

> The defendants pressed these doctrines in the District Court as though they were to be used as clubs to accomplish the policy embedded in them: the prevention of repetitive litigation. *The doctrines must be used, however, not as clubs but as fine instruments that protect the litigator's right to a hearing as well as his adversary and the courts from repetitive litigation.* (Italics ours.)

Petitioner's First Amendment claim is not barred by the judgment of the state court.

The district court concluded that the petitioner's "First Amendment claim was not actually litigated in the prior suit;" nonetheless, it found that although a plaintiff "may bring her constitutional claims in the federal court, the Sixth Circuit has held that state courts are competent to decide questions arising under the federal constitution (citations omitted)." The district court thereupon de-

cided that "The plaintiff could have brought her First Amendment claim in the state court and she is, therefore, barred from asserting it here." (Citation omitted.) The conclusion that a state court is empowered to decide questions arising under the federal constitution bears no legal significance in the res judicata controversy of this case. If the right and the delict which are involved relative to the petitioner's First Amendment claim have not been adjudicated, the defense of res judicata is unavailable.

The discharge of the petitioner caused injury to her reputation, implicating liberty and property interests sufficient to invoke the procedural protection of the due process clause of the Fourteenth Amendment.

The district court found that the allegations of the complaint involving the "good name, reputation, honor and integrity" of the petitioner amount to no more than a claim of defamation. With no name-clearing hearing accorded the petitioner, the district court held, nevertheless, that the bar of res judicata was appropriate to the claim of stigmatization because it "arises from the same claim and set of circumstances which were litigated in the state court." The court, therefore, decided that the claim is barred by res judicata, and also by the statute of limitations of Ohio.

In *Paul v. Davis*, 424 U. S. 693, 709-710, this Court has held that an injury to reputation had not resulted in a deprivation of liberty because it was not associated with the termination of employment. In the instant case a more tangible interest, other than reputation alone, is involved—the loss of employment.

The complaint's allegations of civil rights violations are broader than the common-law tort of defamation. The appropriate and effective response to the rationale of the lower courts is to be found in the concurring opinion of Justice Harlan in *Monroe v. Pape,* 365 U. S. 167, wherein he declared:

> . . . [A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right, and, therefore, deserves a different remedy even though the same act may constitute a state tort and the deprivation of a constitutional right.

After finding that the claim of reputational injury is barred by the statute of limitations, the district court applied "the most analogous state statute of limitations to the underlying constitutional claim," Section 2305.11 of the Ohio Revised Code. This provision requires that an action for defamation must be brought within one year. The district court concluded therefrom that the alleged claim of defamation had been outlawed on the date the present case had been filed.

The federal complaint alleges that this is a "proceeding to redress the violations of rights guaranteed to the plaintiff by the Constitution of the United States. The action arises under the First, Fifth, and Fourteenth Amendments to the Constitution and Sections 1983 and 1985 of Title 42 of the United States Code. . . ." In substance, the allegations of the complaint charge the defendants with an intentional tort which deprived petitioner of her constitutional rights. The author of *Black's Law Dictionary,* Fifth Edition, (1979), defines *intentional tort* as follows:

> Tort or wrong perpetrated by one who intends to do that which the law has declared wrong as contrasted with negligence in which the tortfeasor fails to exercise that degree of care in doing what is otherwise permissible.

It is axiomatic that the character of a cause of action is determined by the allegations contained in the complaint. It is up to the plaintiff, by inserting certain factual allegations, to frame the particular cause of action. The question presented in this respect is: Does the complaint allege a conspiracy among the respondents for the accomplishment of an unlawful purpose in violation of the petitioner's civil rights? Ohio regards the conspiracy for an unlawful purpose, rather than the slander, to be the substantive ground for recovery. Ohio follows the generally accepted doctrine that persons uttering slanders in pursuance of a conspiracy to slander, and all the members of the conspiracy, may be held liable jointly.

The law in Ohio applicable to and dispositive of the issue whether the gist of the present action is one for libel or slander, or whether it is a case of conspiracy to injure a person by libel or slander, is fully set forth in 34 O. Jur. 2d, *Libel and Slander*, Section 129. The author states the rule as follows:

> Action for Conspiracy to Libel or Slander.—The action for conspiracy to injure a person by libel or slander, and the action for libel or slander, are not so identical in character as to bring both into one category under the statute of limitations. The statute limits the bringing of actions for libel and slander to one year from the utterance or publication of the defamatory words, but no section of the statute of limitations so limits the bringing of actions for conspiracy, although the means adopted to accomplish

> the purpose of the conspiracy is libel or slander. In the one case, the libel or slander is the gist of the action, in the other it is a mere incident to the accomplishment of the purpose for which the conspiracy was formed. The conspiracy action, therefore, is not barred by the statute applying to libel or slander.
>
> It has been said that it is probable that the statute of limitations, applying to an action "for an injury to the rights of the plaintiff not arising on contract nor enumerated in" other specified sections of the Code, is applicable to an action for conspiracy to injure a person by libel or slander.[1]

The authority for the foregoing statement is to be found in the decision of the Ohio court in *Zurhorst v. Kroll,* 10 OCC (NS) 228. The first paragraph of the syllabi is especially pertinent to the issue regarding the applicability of the one-year statute of limitation to the instant case. The court held:

> An action for conspiracy to injure one by libel or slander and an action for libel and slander are not so identical in character as to bring them both into one category under the statute of limitations; and where the conspiracy forms the gist of the action and libel or slander is merely incidental to the accomplishment of that purpose, the action is not barred by the statute applying to libel or slander.

The ruling of the court in *Slavinas v. Ambrose,* 27 NP (NS) 279 (Ohio), as set forth in syllabi 1 and 2, is enlightening:

> 1. A suit which charges several defendants with having conspired to injure the good name and standing of the plaintiff by circulating slanderous statements, is an action for conspiracy, notwithstand-

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[1]Ohio Revised Code, Section 2305.09, set forth on page 23 herein.

ing any of the defendants might have been sued separately for slander, and such petition is not open to demurrer for misjoinder of actions or parties.

2. In a petition for conspiracy the plaintiff must recite the illegal acts done by the conspirators and the resulting damage to his person or property.

The Supreme Court of Ohio also had occasion to pronounce itself on the issue herein in the case of *Schoedler v. Gauge & E. Co.*, 134 Ohio St. 78, and held, as follows:

1. Where slander is uttered by one or more persons, pursuant to a conspiracy which included among its purposes the defamation of another, all parties to the conspiracy are jointly liable and may be joined as parties defendant in the same action.

2. Where acts of slander by different parties to a conspiracy are committed on different occasions, in the presence or absence of each other, but pursuant to a common design, they are, in legal contemplation, the joint acts of all.

In the present case, the complaint reveals that the object of the respondents' conspiracy was something more than the slandering of the petitioner. The respondents were agreed and determined to bring about, and did bring about by wrongful means, the termination of the petitioner as a supervisor of education for the Warren City School District Board of Education.

There can be no dispute that the time for filing suit under the Civil Rights Act is controlled by the applicable state statute of limitations. We believe the Ohio statute which governs the instant case is Section 2305.09 of the Revised Code of Ohio. This section in its pertinent part states:

Four years: certain torts.

An action for any of the following causes of action shall be brought within four years after the cause of action accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.04 and 1304.29 of the Revised Code.

The decision of the district court denies a federal forum to a litigant with meritorious and unlitigated constitutional claims, thereby contravening Section 1983's intent and purpose.

The legislative history of the Civil Rights Act, as frequently considered by this Court, evidences a specific Congressional intent to provide a federal remedy to protect a citizen's civil rights even where alternative remedies exist. Congressional concern was centered on the protection of the individual rights, not federalism, judicial recourse, comity, the federal case load or other policies. Congress has never altered its intent to make federal courts the primary protector of constitutional rights through Section 1983. As noted by Justice Douglas:

> The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. *Whether or not that premise is true today, the fact remains that there has been no alteration of the Congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth*

> *Amendments and the Civil Rights Acts. Harrison v. NAACP*, 360 U. S. 167, 181 (1959), (Douglas, J., dissenting). (Italics ours.)

The federal-state court relationship, as it is perceived in our situation, was correctly reviewed by Justice Blackmun in the dissenting opinion in Allen and in which he was joined by Justices Brennan and Marshall. Justice Blackmun declared at page 112:

> One should note also that in England v. Medical Examiners, 375 U. S. 411 (1964), the Court had affirmed the federal courts' special role in protecting constitutional rights under Section 1983. . . . The court set out its understanding as to when a litigant in a Section 1983 case might be precluded by prior litigation, holding that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there and then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court.

With regard to the propriety of the decision below, it should be observed that the litigation of the federal claims in the district court would not be duplicative of the state court effort, since the right and delict in the two cases are utterly different. Moreover, and equally significant, is the fact that the litigation of the federal claims would not be a violation of comity, inasmuch as no state court decision would be superseded. Conceivably, the application of the preclusion doctrine would actually increase the caseload of the federal court. A plaintiff with both a state and federal claim would be compelled to bring both in a federal court if he wanted to litigate the federal claim in the federal court.

The courts below construed the concurrent jurisdiction of the state court in Section 1983 actions to preclude the petitioner from invoking the jurisdiction of the federal court simply because she could have litigated her civil rights claims in the state court. The appropriate response to such a proposition was given in *Thermatron Products, Inc. v. Hermansofer*, 423 U. S. 336, 344 (1976), as follows:

> The argument that a federal right of action, specifically created under Section 1983, may be dismissed because a state remedy to enforce such cause of action is available is even less persuasive than the argument that a diversity case may be dismissed or remanded because the state provides a clear remedy. Thus, the notion that the availability of a state court remedy is a proper basis for abstention is incorrect.

In the field of civil rights, Congress has insured that the complainant be given the right to elect the forum in which he prefers to litigate his claim. It is not the petitioner's position that Section 1983 deprived the state court of jurisdiction over constitutional issues. Certainly, if a plaintiff chooses to bring his Section 1983 action in a state court, nothing in the statute or its legislative history would prevent it. Congress intended, through Section 1983, to provide individuals in petitioner's situation with the opportunity to utilize a federal forum for the protection of their federally secured constitutional rights. This is not to say that if such individuals feel their federal rights can be adequately protected in state courts, they should be compelled to seek federal relief. The choice is that of the complainant to make under Section 1983. On the other hand, to make a federal forum unavailable to the petitioner, as was done in the instant cause, would clearly violate Congressional intent.

> The United States courts are further above mere local influence than the county courts, their judges can act with more independence, cannot be put under terror as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . . We believe we can trust our United States courts, and we propose to do so. Cong. *Globe*, 42 Cong., 1st Sess. 460 (1871). (Remarks of Rep. Coburn.)

Petitioner should be given the opportunity to prove legitimacy of her claim of entitlement to job tenure in light of the circumstances surrounding the discharge.

The district court found that the allegations of the complaint relating to the petitioner's entitlement to employment fail to state a claim upon which relief may be granted. Rule 12(b) (6), Federal Rules of Civil Procedure. The court thereby foreclosed any opportunity for the petitioner to make a showing of the violation of her constitutional rights. The complaint's allegations, which must be construed most favorably to the petitioner at this stage, do raise a genuine issue as to her interest in the continued employment as the Supervisor of Elementary Education. Even though the petitioner did not have tenure, the Civil Rights Act of 1871 gives her a remedy if her contract was not renewed for the school year 1980-1981. Justice Stewart stated in *Perry v. Sinderman*, 408 U. S. 593, 602:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstance of this service—and from other relevant facts—that he has a legitimate claim to entitlement to job tenure.

In case of teachers whose contracts are not renewed, tenure is not the critical issue. *Board of Regents v. Roth*, 408

U. S. 564, 582. The declarations of Justice Douglas in Roth are highly significant (pp. 581, 584, 585):

> No more direct assault on academic freedom can be imagined than for school authorities to be allowed to discharge a teacher because of his or her philosophical, political or idealogical beliefs. . . .
>
> The protection of the individual against arbitrary action . . . is the very essence of due process. Slochower v. Bd. of Ed., 350 U. S. 551, 559, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such arbitrary action. . . .
>
> Non-renewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Non renewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

The constitutional issues raised by the complaint, and heretofore undetermined between the parties, are substantial. The essence of the petitioner's claims is that she incurred the wrath of the respondent board members and others for her vigorous support of certain policies with which the individual respondents disagreed. The decision of the Board not to rehire her, petitioner alleges, was in retaliation for her position as aforestated. The "liberty" and "property" interests implicated in the within cause are secured to the petitioner and protected by the Fourteenth Amendment to the Constitution of the United States. The First Amendment, applicable to the states by reason of the Fourteenth Amendment, also protects the petitioner in her philosophical, political or idealogical beliefs as part of the academic freedom of a teacher. This Court has long

maintained that the constitutional guarantees of the First, Fifth and Fourteenth Amendments are a bulwark against any attack upon academic freedoms, and that these constitutional protections may be invoked against capricious, arbitrary or unreasonable state action.

The decisions of the Court in the area of academic freedom show that the rights of a teacher are especially important and must be dealt with in a scrupulously fair manner by those who are entrusted by law to regulate and to govern the performance and activities of an educator. The Court has pointed out on numerous occasions the importance of the teacher's profession in our democratic society, and the necessity of protecting its personal, associational and academic liberty. "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, to study and to evaluate. . . ." *Sweezy v. State of New Hampshire,* 354 U. S. 234, 250 (1957); *Barenblatt v. United States,* 360 U. S. 109 (1959); *Wieman v. Updegraff,* 344 U. S. 183 (1952); *Adler v. Board of Education,* 342 U. S. 485 (1952).

CONCLUSION

The order of the Sixth Circuit Court of Appeals affirming the judgment of the district court should be reversed.

Respectfully submitted,

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No. 82-738

In The

Supreme Court of the United States

October Term, 1982

DR. ETHEL MIGRA,

Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Is a plaintiff in a federal court action brought pursuant to 42 U. S. C. § 1983 precluded from litigating issues that she might have raised, but in fact did not raise, in a previous state court action between the same parties and based on the same transaction, occurrence, or series of transactions and occurrences?

2. Do petitioner's claims for deprivation of her "liberty interest in her reputation" sound sufficiently in defamation and tort to be barred by Ohio's one-year statute of limitations on actions for defamation and intentional torts?

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Argument:

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A. The federal courts must give the same preclusive effect to state court judgments as would be given under the law of the state in which the action arose. 5

B. Under the most recent pronouncements of the Ohio Supreme Court on res judicata, a party is barred from a second action against the same defendants seeking relief on federal constitutional grounds where such grounds could have been argued in a prior action arising out of the same transaction, occurrence, or series of transactions and occurrences, but were not. 7

II. There is nothing in the legislative history or the prior decisions of this Court which would support the view, advanced by petitioner, that traditional principles of issue preclusion apply in § 1983 actions, but traditional principles of claim preclusion do not. 22

III. Petitioner's claims for injury to her reputation and resultant impairment of liberty interests are barred by Ohio's one-year statute of limitations on defamation actions and actions for intentional torts. 32

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No. 82-738

In The

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DR. ETHEL MIGRA,

Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

In the interest of brevity, respondents will not submit a separate statement of the case. Respondents do wish to clarify three particular points. First, the nonrenewal of petitioner was accomplished in order to abolish the position of Elementary Education Supervisor, a position which has never since been filled. Second, the Board's action in renewing petitioner's contract was accomplished solely as a courtesy to petitioner, on the understanding that she would be submitting her resignation, which she did not do. And finally, petitioner's favorable judgment in the state court was affirmed by the state court of appeals, after which review was denied by the Ohio Supreme Court. As a result, petitioner has been paid back pay for the 1979-80 school year (her nonrenewal in April of 1980

was not challenged), minus unemployment compensation received.

However, respondents must vigorously object to the statement of the case set forth in the brief of the *amicus curiae* American Civil Liberties Union. First, such statement is purely gratuitous in view of Rule 36.5 of this Court, which limits an *amicus* to a statement of interest, summary of argument, argument, and conclusion. Second, and more importantly, the opening paragraphs of this statement recite as "facts" certain matters which are not facts at all, but merely allegations of fact made by petitioner in her federal complaint. Therefore, respondents respectfully submit that the statement of the case of said *amicus* is, in the above respects, inappropriate, and not properly before this Court.

SUMMARY OF ARGUMENT

1. In applying res judicata principles, the federal courts must give to state-court judgments the same preclusive effect which the state courts themselves would give to such judgments. This rule is founded on the "full faith and credit" statute (28 U. S. C. § 1738) as interpreted by this Court in *Allen v. McCurry*, 449 U. S. 90 (1980) and *Kremer v. Chemical Construction Corporation*, — U. S. —, 102 S. Ct. 1883 (1982).

Under this rule, petitioner's claims in this case were properly found to be barred as res judicata, since Ohio law precludes second actions between the same parties or their privies arising out of the same transaction, occurrence or series of transactions and occurrences. The arguments of petitioner and the various *amici* to the contrary are based on the erroneous assumption that under Ohio

law, petitioner had more than one "cause of action" upon which she was entitled to bring suit. While it is true that in earlier times Ohio law might have defined a "cause of action" in the narrow way argued by petitioner, it does not do so today. More recent developments in Ohio law, culminating in the decision in *Johnson's Island, Inc. v. Board of Trustees*, 69 Ohio St. 2d 241, 431 N. E. 2d 672 (1982), indicate clearly that a "cause of action" is now much more broadly defined for claim preclusion purposes. It is also significant to note that in this 1982 decision, the Ohio Supreme Court barred a subsequent action based on federal constitutional claims where, as here, such claims could have been raised in the first proceeding, but were not.

The fact that the state trial court separated and continued petitioner's conspiracy claim, and subsequently approved the voluntary dismissal of such claim, is of no avail to petitioner. The trial court was merely exercising its discretionary authority, under Ohio Civil Rule 42 (B), to order a separate trial of a certain issue before it. At one time, respondents were still susceptible to further state court proceedings *on this issue*. However, petitioner cannot seize on this fact as an opportunity to raise ***entirely new*** claims, in a new forum, which she failed to raise in the first proceeding. Such a result is contrary to both Rule 42 and basic claim preclusion concepts, and should be rejected.

2. In this case, petitioner attempts to avoid the preclusive effect of her first, state-court action against these respondents by arguing that in actions under 42 U. S. C. § 1983, the federal courts should apply the concept of *issue* preclusion (*i. e.*, collateral estoppel) but not the concept of *claim* preclusion (*i. e.*, res judicata or estoppel by judg-

ment). Because there is nothing in the law, the legislative history, or the underlying policy concerns which would support the creation of this new "double standard" of preclusion, petitioner's arguments here must fail.

It is clear from a reading of both *Allen v. McCurry*, 449 U. S. 90 (1980) and *Kremer v. Chemical Construction Corporation*, — U. S. —, 102 S. Ct. 1883 (1982) that this Court views both issue *and* claim preclusion concepts as being fully applicable in Section 1983 actions. Thus, virtually all of the federal circuits to have addressed the question have held that claim preclusion concepts apply fully in Section 1983 actions to bar federal claims which could have been raised in a prior state proceeding, but were not. One additional ground for this position is that allowing a separate federal-court review of federal issues is contrary to well-established principles of federal-state comity.

Finally, the argument in favor of a dual standard of preclusion must be rejected on policy grounds. The burgeoning Section 1983 caseload which now threatens to overwhelm the federal courts would only be increased by a rule which allowed a separate federal review of federal constitutional questions which could have been dealt with in an earlier state court proceeding, but were not. Furthermore, it would be more in the interest of sound judicial administration to have federal constitutional questions determined in the state courts whenever possible: first, because the state courts should bear equally the burden of interpreting and enforcing federal law which is, after all, the "law of the land" under the Supremacy Clause; and second, because in many instances (including the present case) the federal court must look to state courts

in any event for certain relevant interpretations of state law in order to dispose of the issues before it.

3. Petitioner's claims for defamation and impairment of her "liberty interest" are barred by Ohio's one-year statute of limitations upon claims for defamation and other intentional torts. (Ohio Rev. Code § 2305.11). This result is dictated by the well-established rule that in determining what statutes of limitation apply in § 1983 actions, the federal courts are to apply the state statute of limitations which would be applicable in the most closely analogous state action. *Johnson v. Railway Express Agency*, 421 U. S. 454 (1975) (case under 42 U. S. C. § 1981); *Kilgore v. City of Mansfield*, 679 F. 2d 632 (6th Cir. 1982) (Ohio Rev. Code § 2305.11 applies in § 1983 action sounding in intentional tort).

In light of the foregoing, this Court should affirm the decisions of the trial court and the Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The Full Faith and Credit Statute (28 U. S. C. § 1738) requires the federal courts sitting in Ohio to bar subsequent actions between the same parties arising out of the same transaction, occurrence, or series of transactions and occurrences.

A. The federal courts must give the same preclusive effect to state court judgments as would be given under the law of the state in which the action arose.

It is now well-settled that the "full faith and credit" statute (28 U. S. C. § 1738) provides the proper analyti-

cal framework to be used by the federal courts in assessing the preclusive effect to be given to state-court judgments. As noted by this Court in *Allen v. McCurry*, 449 U. S. 90 (1980),

> [T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so:
>
> > "The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . ." 28 U. S. C. § 1738 (1976).

449 U. S. at 96 (citations omitted). This proposition was recently reaffirmed by this Court in *Kremer v. Chemical Construction Corporation*, — U. S. —, 102 S. Ct. 1883 (1982), wherein it is stated quite simply:

> Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgment emerged.

— U. S. at —, 102 S. Ct. at 1889 (extensive footnote omitted).

Thus, in both *Allen* and *Kremer, supra*—the leading cases to apply res judicata principles in the federal-state context—this Court has declared that it is the "full faith and credit" statute which governs any analysis of the preclusive effect to be accorded state-court judgments. In

accordance with this directive, the parties to the present appeal must now attempt to discern, as best as they can from the most recent pronouncements of the Ohio Supreme Court, the current status of Ohio law on the question of res judicata.

B. Under the most recent pronouncements of the Ohio Supreme Court on res judicata, a party is barred from a second action against the same defendants seeking relief on federal constitutional grounds where such grounds could have been argued in a prior action arising out of the same transaction, occurrence, or series of transactions and occurrences, but were not.

The elaborate analyses of Ohio law offered by petitioner and the various *amici* fail to correctly portray the current status of Ohio law on the application of res judicata principles. More specifically, petitioner and the various *amici* fail to recognize and acknowledge the impact of *Johnson's Island, Inc. v. Board of Township Trustees*, 69 Ohio St. 2d 241, 431 N. E. 2d 672 (1982)—the most recent major pronouncement of the Ohio Supreme Court on res judicata, and a decision which dramatically broadens the scope of the doctrine as it now exists in Ohio.

To be sure, the courts of Ohio in earlier times applied issue preclusion and claim preclusion concepts in a very narrow manner. For example, under the ruling of *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 61 N. E. 2d 707 (1945), a plaintiff who suffered both personal injuries and property damage in an automobile accident was entitled to maintain separate actions against a defendant for each type of injury. The theory for allowing separate actions was that "[i]njuries to both person and property suffered

by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action. . . ." 145 Ohio St. at 321, 61 N. E. 2d at 709 (syllabus at ¶ 4).

Beginning in 1958, however, the Ohio Supreme Court embarked on a course which would lead to a significant broadening of issue preclusion and claim preclusion concepts in Ohio. In the case of *Rush v. Maple Heights,* 167 Ohio St. 2d 221, 147 N. E. 2d 599 (1958), the court discarded the anachronistic and cumbersome "dual cause of action" rule of *Vasu v. Kohlers, supra.* In doing so, the court focused on the singular nature of the wrongful act, and concluded that "as the defendant's wrongful act is single, the cause of action must be single. . . ." 167 Ohio St. at 230, 147 N. E. 2d at 604. The new rule, which was declared to be more in accord with "modern practice," 167 Ohio St. 2d at 235, 147 N. E. 2d at 607, was adopted in the hope that it might reduce "the vexatious litigation, with its attendant confusion, which has resulted in recent years from the filing of separate petitions by the same plaintiff. . . ." 167 Ohio St. 2d at 234, 147 N. E. 2d at 607.

Following *Rush v. Maple Heights, supra,* the Ohio courts continued to struggle with the concept of what constitutes a "cause of action" for res judicata purposes. In the present context, the definition of a "cause of action" is crucial, since (as already noted by petitioner) the basic rule of Ohio law is that a person is entitled to one lawsuit for each "cause of action" that he has. *Norwood v. McDonald,* 142 Ohio St. 299, 52 N. E. 2d 67 (1943); *Whitehead v. General Telephone Co.,* 20 Ohio St. 2d 108, 254 N. E. 2d 10 (1969). Conversely, a plaintiff in Ohio will

be barred from raising any claims in a second action which he *could have* raised in a first action against the same party, *see e. g., Charles A. Burton Inc. v. Durkee,* 162 Ohio St. 433, 123 N. E. 2d 432 (1954); *Clark v. Baranowski,* 111 Ohio St. 436, 145 N. E. 76 (1924); *Covington and Cincinnati Bridge Co. v. Sargent,* 27 Ohio St. 233 (1875), *but only* if the second proceeding is based on the same "cause of action," *see, e. g., Norwood, supra.*

In 1968, the Ohio Supreme Court made two conspicuous attempts to deal with the question of what constitutes a "cause of action" for res judicata purposes. In *Henderson v. Ryan,* 13 Ohio St. 2d 31, 233 N. E. 2d 506 (1968), the court was faced with a claim by a defendant attorney (Ryan), that a malpractice claim against him was barred by a previous action against him for fraud, in which he and several other defendants had been exonerated. As both actions arose out of the same general set of events, the court found it necessary to address the question of what constitutes a single "cause of action" under Ohio law:

> What then constitutes a cause of action? Although the meaning given the term may vary according to the purpose for which it is sought (*United States v. Memphis Cotton Oil Co.,* 288 U. S. 62, 67, 68, 53 S. Ct. 278, 280, 77 L. Ed. 619, 623), legal writers have categorized three general views:
>
> 1. A cause of action is identical with a remedial, or secondary, right. This definition, reminiscent of the common-law forms of action, equates a cause of action with each legal theory a plaintiff may have to redress an injury even though arising from a single wrongful act. This view has found disfavor with most courts and authorities because it perpetuates the pleading of legal theories instead of "a statement of

facts constituting a cause of action in ordinary and concise language." See Section 2309.04, Revised Code.

2. "[T]he facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delicit or act of wrong" give rise to a cause of action. This concept omits the remedial right and duty of the first definition, thereby emphasizing substantive rights as distinct from procedural rights. It is concerned with the wrongful act and not with the theory of recovery.

3. A cause of action is a group or aggregate of operative facts, limited "to a single occurrence or affair, without particular reference to the resulting legal right or rights." This so-called "factual unit" theory places the emphasis upon the breadth of the transaction or occurrence rather than the particular right of the plaintiff which has been infringed. The broadest in scope, this definition compels the pleader to include in his petition all elements of the transaction or occurrence at the risk of splitting his cause of action.

13 Ohio St. 2d at 33-34; 233 N. E. 2d at 508-09. In comparing these three basic definitions to Ohio law, the court found that

> [t]his court has previously adhered to the "primary right-primary duty" concept, looking to the defendant's wrongful act.
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> • • •
>
> *However, multifold aspects of the same wrongful act, i. e., negligence consisting of several concurrent acts, do not permit multiple suits.*
>
> • • •
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> We are obliged then, to determine whether the case now before us involves the same wrongful act as that from which the defendant was exonerated by the former judgment between these parties.

13 Ohio St. 2d at 35; 233 N. E. 2d at 509-10 (emphasis added) (citations omitted).

Significantly, the court in *Henderson did not* find that the plaintiff had separate causes of action for fraud and malpractice. It did permit the second action against Ryan, but only because the existing joinder statute (which had since been repealed) prevented the plaintiff from joining the two claims against Ryan. There is no question, however, that law of Ohio as it was being declared at the time of the *Henderson* decision (January of 1968), was moving toward a broader application of res judicata principles:

> Thus, the Code no longer contains any impediment to the joinder of causes of action of the kind asserted by the plaintiff in this case. *The statutory changes reflect a constantly developing policy in the pursuit of simplified pleadings and procedure. To save time and to relieve court congestion, parties are encouraged, if not commanded, to litigate all their claims in one action,* except to the extent that joinder of multifarious and complex issues would produce confusion and prejudice. *Defendants and the courts are thus saved from vexation caused by multiple litigation.*

13 Ohio St. 2d at 38; 233 N. E. 2d at 511 (emphasis added).

Later in 1968, the Ohio Supreme Court accelerated the subtle shift toward a broader definition of a "cause of action" which it had begun in *Henderson, supra.* In *Sharp v. Shelby Mutual Insurance Company,* 15 Ohio St. 3d 134, 239 N. E. 2d 49 (1968), the court again reviewed the three basic definitions of the phrase "cause of action." 15 Ohio St. 2d at 139-40; 239 N. E. 2d at 53-54. It ultimately held that the plaintiff had two separate causes of action, and was thus not barred by res judicata. In doing

so, however, *the court specifically applied the third, or "factual unit," definition of a cause of action,* 15 Ohio St. 2d at 140-41; 239 N. E. 2d at 54, which it defined in relevant part as follows:

> One concept of the term [cause of action] . . . is to the effect that as long as the same wrongful act or transaction is the subject of litigation there is but one cause of action without regard to the application of rules of substantive law to additional or variational facts which are involved and which must be considered. The test under this concept is not whether added facts constitute a material difference in plaintiff's right or defendant's wrong under the substantive law, *but whether such additional facts are so closely woven into the transaction which comprehends the defendant's wrong as to justify the court in regarding multiple interests affected and wrong done as a single unit for the purpose of litigation.*

15 Ohio St. 2d at 140; 239 N. E. 2d at 54 (emphasis added).

Consonant with this shift in Ohio law on preclusion matters was the Ohio Supreme Court's adoption, in 1970, of the Ohio Rules of Civil Procedure—and in particular, Rule 13 thereof.* Ohio Rule 13, like its federal counterpart, establishes a compulsory counterclaim rule embodying the broadest possible definition of a "cause of action":

> A pleading *shall* state as a counterclaim *any* claim which at the time of serving the pleading the pleader has against any opposing party, *if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim* and does not require

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*The Ohio Supreme Court was authorized to promulgate rules for the governance of Ohio's courts by the "Modern Courts Amendment" to the Ohio Constitution, Article IV, § 5, effective May 7, 1968.

> for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Ohio R. Civ. P. 13(A) (emphasis added). The policy concerns served by the compulsory counterclaim rule are clearly stated in the Staff Notes to Ohio Rule 13(A) which provide in relevant part as follows:

> A compulsory counterclaim is one which "is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts." See, *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F. 2d 631 at 634 (3d Cir. 1961).
>
> • • •
>
> The purpose of the compulsory counterclaim is to avoid a multiplicity of suits by requiring in one action the litigation of all claims *arising from an occurrence.*
>
> (Emphasis added.)

Thus, it is clear that in the adoption of the compulsory counterclaim rule, the Ohio Supreme Court was again utilizing a "series of transactions or occurrences" definition of a cause of action. *See Henderson, supra,* 13 Ohio St. 2d at 38; 233 N. E. 2d at 511. The absolute preclusive effect of this rule for compulsory counterclaims not raised has since been recognized by Ohio's courts. *See, e. g., Broadway Management, Inc. v. Godale,* 55 Ohio App. 2d 49, 378 N. E. 2d 1072 (1977).

The 1970's did not witness any significant developments in Ohio's position on res judicata. However, in 1980, 1981, and 1982, the Ohio Supreme Court rendered a number of decisions calling for a broader application of the doctrine. By far the most significant of these deci-

sions was *Johnson's Island, Inc. v. Board of Township Trustees,* 69 Ohio St. 2d 241, 431 N. E. 2d 672 (1982).

Johnson's Island involved a zoning dispute between a homeowners' association and a neighboring landowner, Johnson's Island, Incorporated. At one time, Johnson's Island, Incorporated, had owned virtually all of Johnson's Island, a 275-acre island in Lake Erie. However, following its purchase of the island in 1956, the corporation proceeded to subdivide the outer perimeter of the island for the sale of residential lots. In 1975, the township in which the island was located adopted a comprehensive zoning plan. Under this plan, the entire island was zoned for residential housing.

The specific dispute in *Johnson's Island* related to the operation by the corporation of a limestone quarry on the island. The operation of this quarry required blasting and other heavy industrial activities. Based on the 1975 zoning plan, the local homeowners' association sought and obtained (in 1977) a permanent injunction from the Common Pleas Court of Ottawa County prohibiting Johnson's Island, Incorporated from conducting any quarrying operations on the island. In this action, the corporation had attempted to establish that the operation of the quarry was a "prior nonconforming use." The corporation *did not* challenge the constitutionality of the township zoning regulation as applied to its quarry site. The court of appeals affirmed the injunction, and further review was denied by the Ohio Supreme Court.

In 1978, the corporation filed a second action in the common pleas court seeking a declaration, *inter alia,* that the zoning regulation was unconstitutional as applied to

the quarry. The trial court granted summary judgment against the corporation on res judicata grounds, even though the defendant in the second action was not the homeowners' association, but the board of township trustees. The court of appeals affirmed, and the Ohio Supreme Court certified the case for review.

In 1982, the Ohio Supreme Court affirmed the court of appeals, and in doing so applied res judicata principles more broadly than it ever had before. The application of res judicata was broadened in two particular respects. First, the Ohio Supreme Court relaxed the mutuality requirement to permit the first judgment to act as a bar, even though there was not a strict identity of parties. It found that there was a "mutuality of interest" between the township trustees and the homeowners' association, even though there was no legal privity between them, and even though one was a public entity. 69 Ohio St. 2d at 245; 431 N. E. 2d at 675.

Second, and much more importantly for present purposes, the Ohio Supreme Court precluded a second action raising certain federal constitutional claims, where such constitutional claims could have been raised by a party to the first action, but were not:

> Decisions of this court, and of other jurisdictions, have established that the doctrine of *res judicata* is applicable to defenses which, although not raised, could have been raised in the prior action. Accordingly, if a defendant, as the appellant here, previously neglected to assert the [constitutional] defense, he is precluded from raising it subsequently by virtue of the existence of the judgment rendered in the former action.

69 Ohio St. 2d at 245-46; 431 N. E. 2d at 675. The court stated that the above principle "accommodates the finality of judgments," 69 Ohio St. at 246; 431 N. E. 2d at 675, and set forth the following underlying rationale:

> "The reasoning in such cases is that a party should have his day in court, and that that day should conclude the matter. A party is bound then to present his entire cause and he is foreclosed from later attempting to reopen the cause as to issues which were or could have been presented. . . ."

69 Ohio St. 2d at 246; 431 N. E. 2d at 675-76, *quoting Anderson v. Richards,* 173 Ohio St. 50, 53, 179 N. E. 2d 918, 921 (1962).

For purposes of the present case, where this Court is being called on to discern the current status of Ohio law, it is crucial to recognize that in *Johnson's Island, supra,* the Ohio Supreme Court *cast aside the argument of the corporation that the second proceeding was not based on the same "cause of action."* This argument was briefed and argued to the court.* However, the court proceeded to reject this argument and apply claim preclusion concepts to bar the second action. 69 Ohio St. 2d at 246; 431 N. E. 2d at 675. In doing so, it necessarily found that the whole issue of the zoning ordinance, its constitutionality, and whether the corporation had established a prior nonconforming use were "so closely woven into the transaction which comprehends the defendant's [alleged] wrong" that the court was justified in treating them as a "single unit for the purposes of litigation." *Sharp, supra,* 15 Ohio St.

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*Counsel for respondents have confirmed this fact by reference to the actual record in *Johnson's Island, supra,* which is presently on file in the Ohio Supreme Court Library.

2d at 140; 239 N. E. 2d at 54. Thus, it is clear that, in *Johnson's Island,* the Ohio Supreme Court openly adopted a "series of transactions or occurrences" definition of a cause of action, and that older theories, whereby multiple "causes of action" could spring up from a single event, or series of related events, have been relegated to the dustbin of Ohio legal history.

Indeed, any doubts one might have that Ohio, in *Johnson's Island,* was broadening its definition of a "cause of action" for claim preclusion purposes can be resolved by an examination of the dissent in that case. It is there noted, quite correctly, that the issues of prior nonconforming use (raised in the first action) and the constitutionality of the regulation (raised in the second action) would not be subject to all the same items of proof. 69 Ohio St. 2d at 251; 431 N. E. 2d at 678-79 (W. Brown, J., dissenting). Obviously, a majority of the court did not view this as a critical issue. The majority opted instead for a rule which would require preclusion where, as here, there is a fair relationship between the two issues or claims, even though the facts necessary to prove the two claims would not be identical.

Other cases decided shortly before *Johnson's Island* confirm the increasing tendency of the Ohio Supreme Court to apply preclusion concepts in a broad manner. In *Universal Underwriters v. Shuff,* 67 Ohio St. 2d 172, 423 N. E. 2d 417 (1981), the Ohio Supreme Court applied the doctrine of res judicata to bar an *arbitration* proceeding between two contracting parties (an insurance company and an insured) who had previously litigated a particular matter. Although the court recognized that the doctrine traditionally applied only to subsequent legal *actions, see*

67 Ohio St. 2d at 174; 423 N. E. 2d at 418, it nevertheless chose to extend the doctrine to arbitration proceedings on policy grounds. For similar policy reasons, the Ohio Supreme Court had already barred a taxpayer action challenging the constitutionality of a state statute, where constitutional claims could have been raised in an earlier proceeding, but were not. *Stromberg v. Board of Educ.*, 64 Ohio St. 2d 98, 413 N. E. 2d 1184 (1980). And, in a pair of criminal cases, the court has more recently rejected, on res judicata grounds, attempts in postconviction proceedings to raise federal constitutional issues which could have been raised at some earlier stage. *See State v. Roberts*, 1 Ohio St. 3d 36, 437 N. E. 2d 598 (1982) and *State v. Cole*, 2 Ohio St. 3d 112, 443 N. E. 2d 169 (1982).

In view of the foregoing survey of Ohio law, it cannot now be plausibly maintained that the Ohio Supreme Court, if it were faced with the question today, would permit the petitioner herein to maintain a second action against these defendants for the vindication of certain federal constitutional rights. Petitioner has had her "day in court, and that . . . day should [have] conclude[d] the matter." *Johnson's Island, supra*, 69 Ohio St. 2d at 246; 431 N. E. 2d at 675. Unquestionably, the courts of Ohio would have entertained her constitutional claims had she presented them. *See Dowd Box Co. v. Courtney*, 368 U. S. 502, 507-08 (1962) (state and federal courts have concurrent jurisdiction to hear and decide federal constitutional issues); *accord, Jackson v. Kurtz*, 65 Ohio App. 2d 152, 156, 416 N. E. 2d 1064, 1067 (1979). However, petitioner did not raise such claims in the first action, and is therefore barred from raising them here:

> The doctrine of *res judicata* . . . embraces the policy that a party must make good his cause of action or establish his defenses ". . . by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties."

Johnson's Island, supra, 69 Ohio St. 2d at 244; 431 N. E. 2d at 674, *quoting Covington and Cincinnati Bridge Co. v. Sargent,* 27 Ohio St. 233 (1875) (first syllabus).

Petitioner attempts to avoid the bar of res judicata by arguing that her constitutional claims are not based on the same "cause of action" as the claims that were litigated in the state-court action (Pet. Br. at 16). In addition to being incorrect simply as a matter of law (see preceding discussion), this argument is also unrealistic. Petitioner was hired by the Warren City Board of Education to fill the position of Elementary Education Supervisor. The Board of Education subsequently determined that this position was no longer necessary, and therefore nonrenewed petitioner's contract.* She decided to seek judicial relief for this action of the Board, and did so by filing an action in the Common Pleas Court of Trumbull County, Ohio. In this proceeding, she could have challenged the Board's action on any grounds she wished, including the ground that the Board's action in nonrenewing her contract violated her constitutional rights. However,

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*As noted in the Statement of the Case, *supra,* this nonrenewal became necessary only because petitioner's resignation was not forthcoming, as the Board had been led to believe it would be. When the Board discovered that the resignation would not be forthcoming, it was forced to act on petitioner's contract at a special meeting, with which there were obviously some procedural difficulties.

she elected to challenge the nonrenewal on state procedural grounds only, and on this challenge she prevailed. Apparently unsated by this round of litigation, she now seeks to enmesh these same defendants (and one United States district court) in further litigation—not to vindicate rights which the state court would not protect—but to vindicate rights which the state court was *never asked* to protect.

In this connection, some comment must be made in response to the argument of the *amicus curiae* American Civil Liberties Union that petitioner is entitled to proceed here because her "analogous . . . tort claims" were dismissed without prejudice in the state court (ACLU Br. at 36). This argument is not only without merit; it is also distracting and disingenuous. Under Rule 42 (B) of the Ohio Rules of Civil Procedure, an Ohio trial court is granted the discretion to order a separate trial of any claim or issue if the court, in its discretion, finds that separate trials would be "in furtherance of convenience . . . [or] conducive to expedition and economy." In this case, the trial court exercised this discretionary authority when it "reserved and continued" (J. A. at 39) and later dismissed without prejudice (J. A. at 54) petitioner's "conspiracy" claim. This claim charged only that the individual defendants "did by unlawful meetings . . . conspire to deprive the plaintiff of her *contract* rights with the Warren City School District." (J. A. at 28) (emphasis added). Certainly, were it not for the statute of limitations,* respondents would still be susceptible to suit

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*Petitioner is now barred from proceeding on her tortious interference claim by Ohio's four-year statute of limitations on unspecified torts, Ohio Rev. Code § 2305.09. Her abandonment of this claim is not surprising in view of the fact that Ohio law does not recognize a cause of action for tortious inference

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in state court *on this claim*. However, it is clearly not within the contemplation of Rule 42 (B) that in the separated trial of a particular claim, the plaintiff is entitled to bring in entirely new claims against the same defendant on the theory that they are "analogous" to the separated claim. Under the interpretation of the *amicus*, petitioner would presumably be entitled to bring a second action under Title VII or Title IX for sex discrimination, or under the Age Discrimination in Employment Act of 1967* or their Ohio counterparts,** if she believed that these statutes applied to her case. Thus, petitioner would be able in the second action to avoid her own failure to "make good [her] cause of action . . . by all the proper means within her control," *Johnson's Island, supra*, 69 Ohio St. 2d at 244; 431 N. E. 2d at 674, simply by having an "analogous" claim dismissed without prejudice. Respondents respectfully submit that this result is neither equitable nor in keeping with the policy of Ohio law on claim preclusion as expressed in the preceding argument, and should therefore be rejected by this Court.

In light of the entire preceding discussion, it is apparent that Ohio law, as this Court now finds it, would bar petitioner's second action against the same defendants

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with contract in the employer-employee context. *See Fawcett v. G. C. Murphy & Co.*, 46 Ohio St. 2d 245, 248 N. E. 2d 291 (1976); *Anderson v. Minter*, 32 Ohio St. 2d 207, 291 N. E. 2d 457 (1972).

*The statutes referred to are: Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e et seq.), Title IX of the Education Amendments of 1972 (20 U. S. C. § 1681 et seq.), and The Age Discrimination in Employment Act of 1967 (29 U.S.C. § 623 et seq.).

**See e. g., the Ohio Civil Rights Act (Ohio Revised Code Section 4112.01 et seq.).

asserting new claims under the federal constitution. Therefore, since the full faith and credit statute (28 U. S. C. § 1738) requires that this Court give to petitioner's first judgment the same preclusive effect that it would have under Ohio law, the decisions of the district court and the Sixth Circuit Court of Appeals according such preclusive effect to such judgment were entirely correct, and should be affirmed.

II. There is nothing in the legislative history or the prior decisions of this Court which would support the view, advanced by petitioner, that traditional principles of issue preclusion apply in § 1983 actions, but traditional principles of claim preclusion do not.

In their briefs to this Court, petitioner and the various *amici* argue that although traditional principles of issue preclusion (*i. e.*, collateral estoppel) apply fully to the litigants in Section 1983 actions, traditional principles of claim preclusion (*i. e.*, res judicata or estoppel by judgment) should not apply. Because there is nothing in the legislative history of Section 1983 or the pronouncements of this Court to support such a "double standard" of preclusion, respondents must urge the Court to reject these arguments and affirm the decision of the Sixth Circuit Court of Appeals.

The basic argument advanced on behalf of petitioner is that because "Congress has never altered its intent to make federal courts the primary protection of constitutional rights," it intended, through Section 1983, "to provide individuals in petitioner's situation with the opportunity to utilize a federal forum for the protection of their federally secured constitutional rights." (Pet. Br. at 23, 25). Thus, petitioner takes the position that she should

be able to look to the federal courts for redress of her federal claims, even though she failed to seek redress for these claims in a prior state court action. This position is, of course, contrary to traditional res judicata principles:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action.

Allen v. McCurry, 449 U. S. 90, 94 (1980), *citing Cromwell v. County of Sac*, 94 U. S. 351, 352 (1877). Admitting this fact, the *amicus* American Civil Liberties Union asks this Court to disregard traditional doctrines and to "fashion a doctrine of qualified preclusion" which accords "full collateral estoppel effect to facts and issues previously decided . . ., but which does not preclude the assertion of a federal constitutional claim in federal court merely because it might have been asserted in an earlier state proceeding." (ACLU Br. at 41-42).

This argument in favor of a new preclusionary "double standard" is unsupportable for a number of reasons.

First, this Court has clearly and unequivocably stated —twice within the last three years—that traditional concepts of issue preclusion *and* claim preclusion apply in Section 1983 actions. In *Allen v. McCurry*, 449 U. S. 90 (1980), this Court left no doubt as to the full applicability of traditional res judicata principles in cases such as the present one:

> [I]n 1871 *res judicata and* collateral estoppel could certainly have applied in federal suits following state-court litigation between the same parties or their privies, and nothing in the language of § 1983 remotely expresses any congressional intent to contravene the

> common law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U. S. C. § 1738, ... Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.
>
> Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. . . . [I]n the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel *and res judicata*. Since repeals by implication are disfavored, *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 154, 92 S. Ct. 1989, 1993, 48 L. Ed. 2d 540, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

449 U. S. at 97-99 (emphasis added) (footnotes omitted). The above proposition was decisively reaffirmed by this Court less than a year ago in *Kremer v. Chemical Construction Corporation*, — U. S. —, 102 S. Ct. 1883 (1982). In doing so, this Court added the following comments on the importance of a uniform application of traditional preclusion concepts in Section 1983 actions:

> [T]he federal courts consistently have applied *res judicata and* collateral estoppel to causes of action and issue decided by state courts. *Allen v. McCurry*, 449 U. S. 90, 96, 101 S. Ct. 411, 416, 66 L. Ed. 2d 308 (1980); *Montana v. United States*, 440 U. S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979); *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 92 L. Ed. 832 (1946). Indeed, from *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195 (1877), to *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), this Court has consistently emphasized

> the importance of *the related doctrines of res judicata and collateral estoppel* in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. *Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Allen v. McCurry,* 449 U. S., at 94, 101 S. Ct., at 414; *Cromwell v. County of Sac,* 94 U. S., at 352. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana v. United States,* 440 U. S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210. *Parklane Hosiery v. Shore,* 439 U. S. 322, 326 n. 5, 99 S. Ct. 645, 649 n. 5 (1979). Thus, invocation of res judicata and collateral estoppel "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry,* 449 U. S., at 94, 101 S. Ct., at 414. When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.,* at 96, 101 S. Ct., at 416.

— U. S. at —, 102 S. Ct. at 1889-90 n. 6 (emphasis added). Respondents will not belabor these points further, which have been so recently and convincingly made in *Allen* and *Kremer.* It suffices to say here that, in view of above-quoted passages from these decisions, no plausible argument can be made today that Congress, in enacting Section 1983, expected the federal courts to apply only the collateral estoppel aspect of traditional res judicata doctrine and to ignore an equally important function of that doctrine—namely, to preclude the further litigation of claims which were, or could have been, raised in a previous action between the parties.

Second, the position advocated by petitioner has been soundly rejected by virtually all of the federal circuits which have been faced with the question. These circuits have held that claim preclusion concepts are fully applicable in Section 1983 actions to bar federal claims which could have been raised in an earlier state proceeding, but were not. *See Lovely v. Laliberte,* 498 F. 2d 1261 (1st Cir. 1974), *cert. denied* 419 U. S. 1038 (1974); *Southern Jam, Inc. v. Robinson,* 675 F. 2d 94 (5th Cir. 1982); *Castorr v. Brundage,* 674 F. 2d 531 (6th Cir. 1982), *cert. denied,* — U. S. —, 103 S. Ct. 240 (1982); *Lee v. City of Peoria,* 685 F. 2d 196 (7th Cir. 1982); *Robbins v. District Court,* 592 F. 2d 1015 (8th Cir. 1979); *Scoggins v. Schrunk,* 522 F. 2d 436 (9th Cir. 1975), *cert. denied,* 423 U. S. 1066 (1976); *Spence v. Latting,* 512 F. 2d 93 (10th Cir. 1975), *cert. denied,* 423 U. S. 896 (1975). Two circuits have adopted a contrary view. *See Lombard v. Board of Educ.,* 502 F. 2d 631 (2d Cir. 1974), *cert. denied,* 420 U. S. 976 (1975); *New Jersey Educ. Assn. v. Burke,* 579 F. 2d 764 (3d Cir. 1978), *cert. denied,* 439 U. S. 894 (1978). However, it is important to note that in the most recent of these cases (*Burke, supra*), the Third Circuit allowed a second, federal-court action to proceed only in a situation "where a federal suit is commenced before a final decision by the state court. . . ." 579 F. 2d at 774. Thus, it is not even clear that the Third Circuit would allow a second action in the present case, where no effort to invoke the jurisdiction of the federal court was made until *after* the state court proceedings had gone to judgment.

A third reason for rejecting petitioner's proposed "double standard" for preclusion is that it would violate well-established principles of federal-state comity. As noted by Professor Currie of the University of Chicago

in his excellent article, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 338 n. 153 (1978):

> [T]o encourage state defendants to reserve federal issues for separate federal actions would offend the policy of federalism underlying *Younger v. Harris* [401 U. S. 37 (1971)].

This policy of federalism is described by Professor Currie in the following terms:

> *Younger* reflects the policy that federal courts should "not duly interfere with the legitimate activities of the States" and that the friction incident to federal interference ought not to be tolerated so long as state courts provide an adequate opportunity to resolve federal claims. *A litigant who has failed to make full use of his state court opportunity has not made a showing that the opportunity was inadequate.*

45 U. Chi. L. Rev. at 320-21 (quoting *Younger, supra*, 401 U. S. at 44) (emphasis added). In a similar fashion, this Court has also recognized the destructive effect on state-federal relationships of allowing a separate "constitutional review" of matters already litigated in a state court. In *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1975), this Court refused to allow a state-court defendant to maintain an injunction proceeding in federal court following a state-court judgment against him, since to do so would cast "a direct aspersion on the capabilities and good faith of [the] state . . . courts." 420 U. S. at 709 (decided on abstention grounds).

Fourth and finally, petitioner has not presented any convincing policy reasons why an exception to traditional preclusion concepts—and to 28 U. S. C. § 1738—is required under the circumstances of this case. The essence of petitioner's argument here is that since she is asserting federal claims, she cannot be denied her day in a federal court. (Br. Pet. at 23-26). This argument was categor-

ically rejected, however, in *Allen v. McCurry*, 449 U.S. 90 (1980):

> The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

449 U.S. at 103-04 (footnotes omitted). Equally unconvincing is petitioner's claim that to preclude a second action in federal court is to "make a federal forum unavailable to the petitioner." (Br. Pet. at 25). Clearly, a federal forum *was* available to the petitioner in this case, as she herself concedes (see Br. Pet. at 25). Petitioner elected a different forum, however, and cannot now be heard to complain that the federal courthouse doors are closed to her. In this respect, petitioner is like the appellant in *Spence v. Latting*, 512 F.2d 93 (10th Cir. 1975), whose arguments were rejected by the Tenth Circuit with the following comments:

> Spence argues that the total effect of res judicata, together with the Pullman abstention doctrine, is to deny him a federal forum for vindication of federal

> rights. He says that he is barred from bringing his federal and state claims in a federal forum by the abstention doctrine and that, after final judgment in state court, he is barred from the federal forum by res judicata. It may be that if this suit had been initially filed in the federal court, that court would, in its wise discretion, have remitted Spence to the appropriate administrative body for a post-termination hearing. A full and fair hearing there might very well have obviated or conditioned the adjudication of the federal question. . . . *We do not reach this question, because Spence chose the state forum, which as we have seen, has jurisdiction to redress all his claims, federal and state. The federal court house doors were initially open to him; but he deliberately chose the state forum.*

512 F. 2d at 99 (emphasis added) (footnotes omitted).

Indeed, if there are any policy considerations which are worthy of this Court's attention in this case, they are considerations which militate against the position advocated by petitioner. In 1981 alone, over 30,000 civil rights actions were filed in the federal district courts of the United States. *See Patsy v. Board of Regents*, — U. S. —, 102 S. Ct. 2557, 2577 (1982) (Powell, J., dissenting). If petitioner's view is adopted, the problems created by this burgeoning Section 1983 caseload would only be exacerbated. Every individual who believed that his constitutional rights had been violated would be entitled to a separate federal review of his claims, even though he had previously engaged the same defendants in litigation in a state court. Clearly, the creation of a right to such a separate review, as a matter of federal law, will do nothing to alleviate the overwhelming burdens which now weigh on the federal courts, or to improve the quality of justice which those courts are able to provide.

The position advocated by petitioner is also bad policy for a more fundamental reason—namely, that it contravenes the very important policies of finality, repose, and fairness to defendants which have been embodied in the doctrine of res judicata since the very origins of the English common law. The doctrine is, like the doctrine of *stare decisis*, a cornerstone of the Anglo-American jurisprudential system. *See Shoemaker v. City of Cincinnati*, 68 Ohio St. 603, 612, 68 N. E. 1, 2 (1903). *See also Jeter v. Hewitt*, 63 U. S. (22 How.) 352, 363-64 (1859). In the case at bar, it is clear that this fundamental policy of the law will be frustrated by the interpretation sought by petitioner. Petitioner has had her day in court, and that day should have resolved all questions between the parties relating to the nonrenewal of petitioner's employment contract with the Warren City Schools. Any other conclusion would impair the ability of our courts to perform the very social function for which they were created—that is, to resolve disputes. *See Currie, supra*, 45 U. Chi. L. Rev. at 325.

In conclusion, it is important to recognize also that the view of the petitioner on claim preclusion is bad public policy because it encourages the state courts to abdicate their responsibility to hear and determine questions of federal constitutional law. Under the Supremacy Clause (U. S. Const., art. VI, cl. 2), federal law is indeed the "law of the land," and the burden of applying and enforcing this law has always been recognized as an obligation of the state, as well as the federal, courts:

> Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the consti-

> tution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them. . . .

Robb v. Connolly, 111 U. S. 624, 637 (1884). This obligation of the state courts to shoulder part of the responsibility for enforcing federal rights is not merely a function of the Supremacy Clause. It is also highly desirable as a matter of sound judicial administration. The federal courts, even in applying federal law, must often look to the state courts to supply necessary interpretations of state law. For example, in this very case, the federal district court would be required to look to Ohio law to determine whether petitioner had a "property interest" in continued employment which was protected by the Due Process Clause (Fed. Compl. at ¶ 24; J. A. at 9). *See Perry v. Sindermann*, 408 U. S. 593 (1972). Thus, having the state courts adjudicate a plaintiff's federal claims, as well as his state claims, is often a more sensible and efficient utilization of judicial resources than the separate federal review envisioned by petitioner.

In light of the above, it is apparent that petitioner has not advanced any legal or policy considerations which would justify an exception to the full faith and credit statute (28 U. S. C. § 1738) or the creation of a new "double standard" of preclusion—that is, a standard which recognizes collateral estoppel, but ignores the equally important concept of claim preclusion. Respondents therefore respectfully submit that the judgment entered by the trial court herein was eminently sound and reasonable, was wisely affirmed by the Sixth Circuit, and should again be affirmed here.

III. Petitioner's claims for injury to her reputation and resultant impairment of liberty interests are barred by Ohio's one-year statute of limitations on defamation actions and actions for intentional torts.

In this case, the district court granted summary judgment against petitioner because, *inter alia*, her "liberty interest" claims were barred by Ohio's one-year statute of limitations on defamation actions (Pet. Cert. at C 30-31). Although petitioner's "Questions Presented" do not actually present this issue for review, petitioner nevertheless argues this matter in the text of her brief (Pet. Br. at 18-23). Therefore, respondents feel compelled to demonstrate here the correctness of the trial court's ruling on this question.

One basis for petitioner's federal action involves what is in essence a common law tort claim for imposition of a "stigma" upon petitioner "thereby depriving her of the liberty interest in her reputation" and causing her to suffer "mental distress, humiliation, embarrassment and defamation of her character and reputation." (Fed. Compl. at ¶¶ 24, 25; J. A. at 9, 10). These claims are based on certain alleged acts of respondents leading up to the vote of the Board of Education to nonrenew petitioner's contract on April 24, 1979 (Fed. Compl. at ¶ 16; J. A. at 7). Because these various claims are most closely analogous to the common law claims of defamation and intentional tort, they are barred by the one-year statute of limitations applicable to such torts in Ohio, Revised Code Section 2305.11.

It is now well-settled that because 42 U. S. C. § 1983 does not in itself contain a statute of limitations, a "fed-

eral district court must apply the statute of limitations of the state where it sits which would be applicable in the most closely analogous state action to determine the time within which the cause of action must be commenced." *Mason v. Owen-Illinois, Inc.*, 517 F. 2d 520, 521 (6th Cir. 1975); *accord, Kilgore v. City of Mansfield*, 679 F. 2d 632 (6th Cir. 1982) (Ohio's one-year statute of limitations applies in § 1983 action sounding in intentional tort). *See also Johnson v. Railway Express Agency*, 421 U. S. 454 (1975) (applying state statute of limitations to a civil rights action arising under the provisions of 42 U. S. C. § 1981).

The procedure for assessing the similarity of the various state law torts to the federal claim presented requires an analysis of three factors: "(1) the defendant's conduct, (2) the plaintiff's injury, and (3) the relief requested." *Myers v. Pennypack Woods Home Ownership Assn.*, 559 F. 2d 894, 901 (3rd Cir. 1977). Applying these three factors to the present case, the petitioner has alleged (1) that the respondents' conduct amounted to the defaming of her name and reputation by maliciously spreading untruths concerning her job performance as an Elementary Supervisor, which (2) culminated in the respondents' vote of nonrenewal and "mental distress, humiliation, embarrassment and defamation of character" for which petitioner (3) seeks compensatory damages of $250,000.00 and punitive damages of $250,000.00 against respondents.

From this review of petitioner's claims, it is evident that her action is most analogous to the interests protected by the tort of slander and libel which, under Ohio law, is

subject to a one-year statute of limitations. Section 2305.11 of the Ohio Revised Code reads in pertinent part as follows:

> *An action for libel, slander,* assault, battery, malicious persecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, *shall be brought within one year after the cause thereof accrued. . . .* (Emphasis added.)

This one-year statute of limitations on defamation actions bars the claims of petitioner described above. This action was not filed until July 10, 1980. The alleged defamatory acts of the respondents, however, took place some time *prior* to April 24, 1979—the date upon which petitioner's limited contract was nonrenewed. Therefore, petitioner has not alleged any defamatory actions of respondent within the one-year period of limitation for actions of that type.

For purposes of the present case, it is important to recognize that under Ohio law, a cause of action accrues when the wrongful act complained of is committed, and not when the date of damage is discovered or reasonably should have been discovered. *Wyler v. Tripi,* 25 Ohio St. 2d 164, 267 N. E. 2d 419 (1971). In *Pearl v. Koch,* 5 Ohio Dec. 5 (1894), the common pleas court held that the statute of limitations for libel or slander commences to run from the time the alleged slanderous words were spoken, and not from the time plaintiff had knowledge that they were spoken. Thus, a slander and libel action would be barred where the facts showed that the alleged defamation took place in 1962 and the counterclaim asserting a cause

of action was filed in 1966, well beyond the one-year limitations found in Section 2305.11. *Starr v. Rupp,* 421 F. 2d 999 (6th Cir. 1970).

It is also important to note here that under Ohio law, an action which is in substance an action for libel or slander is barred by the one-year statute of limitations irrespective of how the tort is characterized by the plaintiff. *A. L. Englander Motor Co. v. DeGaetano,* 120 Ohio St. 443, 166 N. E. 372 (1929). Further, as here, a plaintiff's allegations of injury to reputation and embarrassment and mental distress are within the scope of a tort action for libel and slander. *Kahn v. Cincinnati Times-Star,* 10 Ohio Dec. 599 (1890), *aff'd,* 52 Ohio St. 662, 44 N. E. 1132 (1895).

The district court's award of summary judgment to respondents on petitioner's defamation claims was correct as a matter of both Ohio and federal law. The courts of Ohio have assumed that when the General Assembly enacts a statute of limitations, it is aware that the statute will operate without reference to merit and will cut off all claims after a certain time span. *See Wyler v. Tripi, supra.* Therefore, where the plaintiff seeks to bring a cause of action when the limitation period has expired, the court must grant defendants' motion for summary judgment. *Mills v. Whitehouse Trucking,* 40 Ohio St. 2d 55, 320 N. E. 2d 668 (1974); *Wentz v. Richardson,* 165 Ohio St. 558, 138 N. E. 2d 675 (1956). *See also Starr v. Rupp,* 421 F. 2d 999 (6th Cir. 1970). And, more specifically, where the claims in a civil rights action brought in a federal court are construed to be for libel or slander, the action is barred if filed after the one-year applicable state statute of limitations. *De Marrais v. Community*

College of Allegheny County, 407 F. Supp. 79, 80 (W. D. Penn. 1975); *aff'd* 571 F. 2d 571 (3rd Cir. 1978); *MacMurray v. Board of Trustees,* 428 F. Supp. 1171, 1178 (M. D. Pa. 1977).

For the above reasons, respondents urge this Court to affirm the decisions of the trial court and the Sixth Circuit holding that the "liberty interest" claims of petitioner sounding in tort for defamation of character are barred by the statute of limitations.

CONCLUSION

In light of the foregoing, it is clear that:

1. The full faith and credit statute (28 U.S.C. § 1738) required the District Court for the Northern District of Ohio to bar petitioner's action, since the courts of Ohio would have barred the action as arising out of the same transaction, occurrence, or series of transactions and occurrences as her first state-court action.

2. There is nothing in the legislative history or prior decisions of this Court, or in any underlying policy considerations, which would support the view that although *issue preclusion* principles apply in Section 1983 actions, *claim preclusion* principles do not.

3. Petitioner's claims for injury to her reputation, and the resultant impairment of her "liberty interests," are barred by Ohio's one-year statute of

limitations on defamation actions and actions for intentional torts.

Wherefore, respondents Warren City School District Board of Education and individual respondents Catherine O. Swan, Henry J. Angelo, Willard T. Rubin, Raymond Tesner, Mary Milheim, and Barbara Miller urge this Court to affirm the decisions of trial court and of the Court of Appeals for the Sixth Circuit in each and every particular.

Respectfully submitted,

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No. 82-738

In The
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October Term, 1982

DR. ETHEL MIGRA,
Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 35 of this Court, respondents Warren City School District Board of Education and Catherine O. Swan, Henry J. Angelo, Willard T. Rubin, Raymond Tesner, Mary Milheim, and Barbara Miller hereby submit for the information and assistance of the Court the following recently-reported decisions of the United States Courts of Appeal for the First and Fifth Circuits:

Isaac v. Schwartz, 706 F. 2d 15 (1st Cir. 1983).

Nilsen v. City of Moss Point, Mississippi, 701 F. 2d 556 (5th Cir. 1983) (*en banc*).

Both of the above decisions adopt the modern, "transactional" definition of a cause of action as set forth in the Restatement (Second) of Judgments § 24 (1982). *See Isaac, supra*, 706 F. 2d at 17; *Nilsen, supra*, 701 F. 2d at 560 n. 4; *see also Nevada v. United States*, — U. S. —,

103 S. Ct. 2906, 2918 n. 12 (1983) (Restatement view "a more pragmatic approach"). As discussed at length in respondents' main brief to this Court, this "transactional" view of a cause of action is the view which now applies in Ohio following the decision of the Ohio Supreme Court in *Johnson's Island v. Board of Township Trustees*, 69 Ohio St. 2d 241 (1982), and which properly bars petitioner's claims as *res judicata*.

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REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

Inasmuch as the factual posture of the case in the state court is critical to the determination of the issues before this Court, the petitioner must point out the serious inaccuracies in the respondents' statements of the facts in two respects, neither of which has any support in the record of the case. There was no official discussion

by the Board of Education in its consideration of the petitioner's continued employment, first, about abolishing the position occupied by the petitioner as Supervisor of Elementary Education, or second, about renewing petitioner's contract "solely as a courtesy to the petitioner, on the understanding that she would be submitting her resignation, which she did not do." On the contrary, the state trial judge found unequivocally that "[T]he defendant board in its resolution of April 17, 1979, approved the renewal of a limited contract with the plaintiff for the 1979-80 school year as Supervisor of Elementary Education for the Warren City School District, . . . (see Joint Exhibit A; p. 65 of Dr. Migra's transcript)." (App. pp. 30-32; 47, 48.) Thus, the respondents improperly assert as "facts" certain matters which are not facts at all, but self-serving statements of the respondents.

Under Ohio Law Dismissal Of An Action Without Prejudice By Order Of The Court Upon Motion Of The Plaintiff Is Not An Adjudication On The Merits, And, Hence, Does Not Act As A Bar To A Subsequent Suit.

The Full Faith and Credit Statute, 28 U. S. C., 1738 (1976), requires a federal court to give the state court dismissal order the same res judicata effect as would be provided by Ohio courts. Thus, if the state court order is not a final adjudication on the merits, and, therefore, is not treated as res judicata by the state court, a subsequent suit on the same claim is not barred by the doctrine of res judicata. In Ohio, only a final order on the merits is a complete bar to any subsequent action upon the same cause of action between the parties or their privies. *Norwood v. McDonald,* (1943) 142 Ohio St. 299, paragraph one of the syllabus.

The present suit involves parties in addition to the state court defendants, and raises civil rights claims which are being brought for the first time against all of the respondents. The state court complaint asserted two separate and distinct claims, (1) against the school board as a legal entity, and (2) against three of the individual respondents in this action. The respondent board was charged with the wrongful termination of the petitioner in violation of the statutory law of the State. As an additional claim, the petitioner alleged that the individual defendants conspired to deprive her of the position of Supervisor of Elementary Education which she had held for several years in the school district. This tort claim was separated by the trial court, sua sponte, and subsequently dismissed without prejudice by the order of the court at the petitioner's request.

In view of this posture of the state court proceedings, the question arises whether Ohio law would have precluded the petitioner from instituting any further action against the state court defendants on the tort claim which had been dismissed, or on any other action against the same or other parties based upon such tort. Stated otherwise, is the petitioner precluded from pursuing the civil rights claims in this case as a result of the proceedings in the state court?

It is clear from a perusal of Ohio cases that a voluntary dismissal without prejudice has always been considered not to be an adjudication on the merits, not to prejudice the case of the party in whose favor it is entered, and not to act as a bar to a subsequent suit on the same issues. The latest affirmation of this principle was de-

clared by the Supreme Court of Ohio in 1982 in the case of *Chadwick v. Barba Lou, Inc.*, 69 Ohio St. 2d 222, 431 N. E. 2d — (1982). Chadwick was a personal injury suit. Prior to the commencement of the trial of the case plaintiff moved for a continuance due to the absence of an important witness. The court denied the motion to continue but confronted the plaintiff with the alternatives of (1) having the sheriff bring in the witness, or (2) dismissing the case and filing it later. Upon plaintiff's decision to pursue the latter, the following entry was signed by the judge and journalized: "Upon motion of the plaintiff, the within action is dismissed without prejudice to further action. . . ." Within a week thereafter, the plaintiff instituted a new action, which was immediately challenged by the defendant on the ground that it was barred by the statute of limitation. The court overruled the defendant's motion to dismiss, for the reason that the savings statute, Ohio Revised Code, 2305.19, applied.[1] This statute provides, in part:

> In an action commenced . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date.

Although the issue in *Chadwick* revolved about the application of the aforesaid savings statute, the court, in reality, was faced with the issue concerning the preclusive effect of the prior dismissal on the subsequent action. In this respect, the Ohio Supreme Court declared (p. 224):

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[1]The defendant also filed a motion for a judgment notwithstanding the verdict which was granted.

> Since the adoption of the Rules of Civil Procedure the dismissals of actions is governed by Civ. R. 41. Civ. R. 41 (A) governs dismissals initiated by the plaintiff. Under Civ. R. 41 (A) (1) (a) the plaintiff may, in absence of a dependent counterclaim, unilaterally dismiss his action before the commencement of trial simply by filing a notice of dismissal. Civ. R. 41 (A) (1) (b) authorizes the dismissal of actions by stipulation of all parties. A dismissal under Civ. R. 41 (A) (1), whether by notice or stipulation, is without prejudice "[u]nless otherwise stated in the notice of dismissal or stipulation." Civ. R. 41 (A) (2) provides for the dismissal of actions by order of the court upon plaintiff's motion to dismiss. Such dismissal is subject to "such terms and conditions as the court deems proper" and is, by express provision of the rule, a dismissal without prejudice unless otherwise specified in the court's order.

The court went on to hold that dismissal "without prejudice" is one "otherwise than upon the merits" and, that an action dismissed "with prejudice" is vulnerable to the defense of *res judicata.* In support of its conclusion, the court, in footnote n. 4, referred to the definition of "without prejudice" found in *Black's Law Dictionary,* (5th Ed.), which states that when included in an order the words "show that the judicial act is not intended to be *res judicata* of the merits of the controversy." After declaring that, "Under Civ. R. 41 (A) (1) a plaintiff may only once unilaterally dismiss an action while reserving his right to refile," the court concluded that a subsequent dismissal by notice "operates as an adjudication upon the merits and is *res judicata.*" Chadwick enunciates established law in Ohio regarding the res judicata effect of the dismissal of the petitioner's tort claim by the state court. It is clear, therefore, that Ohio would not bar a subsequent lawsuit against the respondents under the circum-

stances of this case. Thus, the language and policies behind the full faith and credit statute would exhort a federal court to give the same effect to the state court order of dismissal of plaintiff's action in the state court as is required by the rendering state, namely, that the petitioner's subsequent action is not barred under any principle of claim preclusion.

Respondents have conceded that petitioner's claim against the respondents for conspiring to interfere with her employment is not barred by Ohio res judicata law. See RB at 20-21. They argue, however, that this action is barred by a four year statute of limitations.[2] That issue, of course, is not before this Court.[3] Respondents' agreement that a conspiracy claim against the school members is not barred from the Ohio state courts by res judicata fatally undermines their contention that a Section 1983 conspiracy claim against the same individuals for the same interference with the contract must be barred from federal court under Ohio rules of res judicata.

Petitioner Had Both A Statutory Claim Against The Respondent Board Of Education As An Entity, And A Distinctly Separate Civil Rights Action Against The Board And The Individual Respondents; And The Pursuance Of One Right Did Not Foreclose Action On The Other.

The civil rights suit in the present case is based upon separate and distinct claims from the cause of action in

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[2]Ohio Rev. Code, Section 2305.09.

[3]However, this Court has required that state tolling rules be utilized to ascertain when a cause of action accrued for statute of limitations purposes, see *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and Ohio Supreme Court's decision in *Chadwick v. Barba Lou, Inc.* Under the Ohio "Savings Statute," a plaintiff ". . . may commence a new action within one year after . . ." his or her failure otherwise than upon the merits. Chadwick at page 662.

the state court. The federal complaint states independent claims arising from the invasion of the petitioner's constitutional rights. The radical difference in the two actions is readily apparent upon a scrutiny of the state court proceedings. The federal action seeks relief for harm distinct from the employment-termination issue adjudicated in the state court. There the petitioner challenged the authority of the board of education to discharge her on the basis of the statutory law of Ohio. In contrast, the petitioner here seeks relief for the violation of her federally secured rights. The state court judgment did not resolve questions of fact and issues of law germane to the federal civil rights claims.

It is inconceivable that the state court would, sua sponte, fragment the cause of action before it, and permit or encourage piecemeal litigation of issues which should have been resolved in the one action. It is undisputed that there is only a single cause of action for the invasion of one primary right. And, admittedly, all grounds upon which a single claim is based must be asserted and concluded in one action, on pain of being barred from a separate suit. But the critical factor is the harm suffered—that the same facts may be invoked in both suits is not conclusive. Petitioner's federal action seeks a different form of relief for a different wrong. The district court action was filed pursuant to 42 U. S. C., Sections 1983 and 1985, alleging a conspiracy to violate petitioner's First, Fifth and Fourteenth Amendments rights. The complaint alleges, in substance, that the respondents' actions amounted to an attack upon the academic freedom of the petitioner as a teacher, and unlawfully stigmatized the petitioner in violation of her liberty interest in her reputation

and deprived her of the property interest in continued school employment without due process of law.

The cases in which the courts have applied res judicata to "claims which could have been litigated" in a prior suit involve specific fact situations, and have limited authority. The respondents cite and rely heavily upon the decision of the Supreme Court of Ohio in *Johnson's Island, Inc. v. Board of Township Trustees*, 69 Ohio St. 2d 241, 431 N. E. 2d 672 (1982), to support their argument that current Ohio law would preclude the litigation of the petitioner's instant federal action. Johnson's Island was decided on the peculiar fact situation of the case.

In *Johnson's Island*, a party who was previously defeated on its claim of exemption from a zoning regulation attempted to gain relief on the same issue in a second lawsuit and thereby avoid the effect of the first judgment. The Ohio Supreme Court applied *res judicata* in refusing to allow this collateral attack, explaining that[4] "[t]his principle accommodates the finality of judgments."[5] See also *Stromberg v. Board of Education of Bratenahl*, 64 Ohio St. 2d 98, at 1186. Thus the court applied transactional *defense* preclusion, preventing the defendants from

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[4]Respondent relies (R.B. at 16) on language from *Anderson v. Richards*, 173 Ohio St. 50, 53, 179 N. E. 2d 918, 921 (1962), that a final judgment forecloses a party "from later attempting to reopen [her] case. . . ." In *Anderson*, like *Johnson's Island* but completely unlike petitioner's case, a defeated party sought a rehearing on the same issues previously litigated. *Anderson, supra*, at 920.

[5]The minority opinion, with three justices dissenting, felt that the case involved the doctrine of collateral estoppel and not res judicata (p. 250).

asserting as claims matters that could have been asserted as defenses in a prior action.

The issue of the definition of cause of action for *res judicata* purposes was not addressed by the *Johnson's Island* majority, who were concerned only with furthering the state's interest in protecting the validity of the previous judgment.[6] *Johnson's Island, supra,* at p. 675. Although respondents characterize the two dissents in *Johnson's Island,* a 4-3 decision, as resolving "any doubts one might have" that Ohio has "openly adopted" a new definition of *cause of action,* R.B. at 17, the three dissenting justices focused on their disagreement with the majority's conclusion on privity. *Johnson's Island* at 678-679 (Wm. B. Brown, dissenting); *id.* at 679, 680 (C. F. Brown, dissenting). Although one dissent did argue that the suit could be considered a separate cause of action with different proof requirements, *id.* at 678 (Wm. B. Brown, dissenting), his disagreement turned on the procedural positions of the parties in the two suits, and certainly could not and did not transform the majority decision into a *sub silentio* overruling of the traditional cause-of-action definition of *Norwood.*[7]

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[6]This policy is not implicated in petitioner's action, for she does not challenge the validity of her state court judgment.

[7]Even aside from this evidence of the continuing validity of the *Norwood* formulation, this Court should note that when the Ohio Supreme Court departs from past precedents, it does so specifically and explicitly in the official syllabus of a case. *See e. g., State of Cole,* 2 Ohio St. 3d 112, 443 N. E. 2d 169 (1982) (syllabus: Par. 2 of syllabus in *State v. Hester,* 45 Ohio St. 2d 71, 341 N. E. 2d 304 (1975), modified); *Anderson v. Richards,* 173 Ohio St. 50, 179 N. E. 2d 918, 919 (1962) (syllabus par. 2: ". . . *Jolley v. Martin Brother Box Co.,* 158 Ohio St. 416, 109 N. E. 2d 652 (1952), overruled)."

In the previous *Johnson's Island* litigation, the corporation which owned a limestone quarry on a site zoned for residential housing had been sued by a group of homeowners who sought to enjoin the operation of the quarry. As a defense, the corporation claimed that it was allowed a non-conforming use under the zoning ordinance, but the homeowners prevailed and the corporation was enjoined from operating the quarry. *Id.* at 673-74. Having failed as a defendant, the corporation brought suit as a plaintiff against the township, seeking to avoid the injunction by obtaining a declaratory judgment that the zoning ordinance was unconstitutional. *Id.* at 673. In rejecting this claim as barred by *res judicata*, the Ohio Supreme Court stated that as a *defendant* in the first suit, the corporation had been bound to raise "any defense which will exonerate [it] from liability, including a defense of the invalidity of the ordinance." *Id.* at 677. In a passage that refutes respondents' reading of *Johnson's Island*, however, the Court went on to indicate that had the corporation initiated the previous litigation to gain a declaratory judgment that it had a non-conforming use under the zoning ordinance, however, a second suit on the claim of unconstitutionality would *not* have been barred. *Id.* at 676-677. ("We find that there is a difference between those instances in which the landowner in the initial action was the party claiming the relief from the law, and instances in which the landowner was in a defensive position, as here."); *see also Jones v. Petruska*, 13 O. O. 3d 111 (1979) (variance application is separate cause of action relating to same subject matter).

The *Johnson's Island* decision is limited on its facts to situations involving the failure to raise a defense in a

prior action. It is noteworthy that in the *Johnson's Island* case the Supreme Court of Ohio cited and reaffirmed *Norwood v. McDonald* and the latest pronouncement of that court on the subject of preclusion as found in *Trautwein v. Sorgenfrei*, (1979), 58 Ohio St. 2d 493.

The other cases cited by respondents to support their contention that Ohio has adopted the single transaction definition, RB 17-18, reiterate the principle of finality of judgments but do not widen Ohio's definition of "cause of action." *See e. g., Universal Underwriters Insurance Co. v. Shuff*, 67 Ohio St. 2d 172, 423 N. E. 2d 417 (1981) (where jury absolved uninsured motorist from liability, court would not undermine that judgment by compelling motorist to submit to arbitration); *State v. Cole*, 2 Ohio St. 3d 112, 443 N. E. 2d 169 (1982) (petition for postconviction relief is "frivolous" and "fails to state a justiciable claim");[8] *Stromberg v. Board of Education*, 65 Ohio St. 2d 98, 413 N. E. 2d 1184 (1980) (dismisses *fourth* action brought to challenge dissolution of school district).[9]

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[8]In *Cole*, one of the "exceptions to the absolute application of the doctrine of *res judicata* cited by the Ohio Supreme Court was *State v. Hester*, 45 Ohio St. 2d 71, 341 N. E. 2d 305, 307 (1976) (no *res judicata* bar where "the record does not disclose that the issue . . . has been adjudicated"). *See also State ex rel. Ogan v. Teater*, 54 Ohio St. 2d 235, 375 N. E. 2d 1233, 1239 (1978) ("the issue of whether the board abused its discretion . . . could not have been a matter of res judicata with respect to respondent").

[9]In the third case in this line, brought in federal court, the Sixth Circuit had barred all claims as *res judicata* from Ohio State litigation *except* a claim that the dissolution of the school district was part of a conspiracy by the School Board to promote segregation which had not been previously raised. *Wilt v. State Board of Education*, 608 F. 2d 1126, 1129 (1979). Thus in applying Ohio *res judicata* rules the Sixth Circuit did not apply the "transactional" definition of cause of action to bar all later claims related to the same subject matter, but rather applied the traditional Ohio rule.

Petitioner Is Not Barred From Litigating In The Federal Court Section 1983 Damage Claims That Were Never Raised, Argued Or Decided Simply Because She Had An Opportunity To Raise The Claims In A Previous State Court Proceeding.

All the grounds which petitioner considered essential and that were required for the successful attack upon the board's action in discharging her were utilized in the state court. The state law issues upon which petitioner proceeded were adequate and sufficient to sustain her case. And, being mindful that the state court separated the count involving the tortious conduct of the individual defendants from the statutory claim regarding the validity of the termination, and proceeded to try the latter alone—without objection on the part of the defendants—it is clear that neither the defendants nor the court viewed the tort claim as one that should have been litigated in the same action with the statutory claims.

The record discloses that the only demand or claim in controversy which passed into judgment in the state court action, and which cannot be brought in litigation between the parties in proceedings at law, involved state law issues totally unrelated to the federal civil rights claims which are before the federal court. The jurisdiction of the state court had not been invoked by either party on the matter of the violation of petitioner's civil rights, and, therefore, the state court could not have considered and passed upon such federal claims. The petitioner could have submitted her federal claims to the state court for

resolution, but she did not.[10] Absent such a voluntary submission, and there being no legal mandate compelling presentation of petitioner's federal claims with her state claims in the state court, it is difficult to accept the propriety of the decisions below. In any event, the record is devoid of legal justification for the action of the district court.

Contrary to respondents' assertion, R. B. at 21, allowing this suit is in keeping with Ohio's policy of permitting separate causes of action which arise from the same subject matter, and is equitable, for "the purposes underlying the principle of *res judicata* [i. e., finality] would . . . not be served by barring litigation to determine the validity of the claims." *City of Cincinnati, ex rel. Crotty, v. Cincinnati,* (1977) 50 Ohio St. 2d 27, 361 N. E. 2d 1340, 1342; *see also United States v. LaFatch,* 556 F. 2d 82, 83 (6th Cir. 1977) ("the doctrine of *res judicata* should not be applied when it would result in manifest injustice to a party . . ."); *cf. Mercoid Corporation v. Mid-Continent Investment Company,* 320 U. S. 661, 669-670 (1943) (equity court will not use *res judicata* to foreclose a party from raising a new issue which is an important public

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[10] In *Macko v. Byron,* (1982), 555 F. Supp. 470, 480, the United States District Court for the Northern District of Ohio stated: ". . . [D]efendants assume that plaintiffs could have asserted their civil rights claim in the state action. . . . There appears, however, to be substantial dispute within Ohio's judicial system as to whether state courts will accept jurisdiction over federal civil rights claims. . . .

"It does not appear that the Ohio Supreme Court has resolved this conflict between its appellate circuits; this Court is ill-equipped to make such a sensitive policy decision involving the operations of the state's judicial system, and will decline to do so." (Citation omitted.)

interest). Where, as here, respondents are concededly subject to a state claim involving the same facts and evidence, the purposes for which Ohio has enacted its *res judicata* rules or indeed any *res judicata* purposes would not be furthered by barring the related federal claim. See Shapiro, "The Application of State Claim Preclusion Rules in a Federal Civil Rights Action," 10 *Ohio N. L. Rev.*, 222, 235 (1983).

Reasonable doubt as to what was decided by a prior judgment should be resolved against making it a bar to subsequent action. *Res judicata* should never be applied when it would result in depriving a party of access to a federal court in a case in which no court has ever ruled upon the party's federal claim for monetary damages due to constitutional violations. The application of *res judicata* to the federal claims of the petitioner would contravene an overriding public policy and result in manifest injustice to the petitioner. She does not argue here that the doctrine of *res judicata* never applies to a Section 1983 action. The petitioner challenges the application of the doctrine to this case, not its theoretical relevance to a Section 1983 claim.

The argument that a party must litigate his federal claims in conjunction with his state court action based on state law claims or be forever barred, is clearly antithetical to the established policy of the Civil Rights Act. This argument has been repeatedly rejected by this Court. Statement in the dissent of Justice Brennan in *Preiser v. Rodriguez*, 411 U. S. 475-513, 514, is especially enlightening:

> By enactment of the Ku, Klux Klan Act of 1871, and again by the Grant in 1875 of original federal question jurisdiction to the federal courts, Congress

recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under federal law.

> "In thus expanding federal judicial power, Congress implied the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and the decision of his federal constitutional rights. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . ." (Citations omitted.)

On June 13, 1983, the Court announced its decision in the case of *Haring, Lieutenant, Arlington County Police Department, et al., v. Prosise,* 51 LW 4736. In essence, the Court ruled that a conviction obtained in a state court upon a voluntary plea of guilty does not preclude the assertion of a claim for damages under 42 U. S. C., Section 1983 for an alleged Fourth Amendment violation that was never considered in state court proceedings. The Court held that the litigation of the Section 1983 claim is not barred because the party had an opportunity to raise his Fourth Amendment claim in the criminal prosecution. As the respondents have done in the instant case, the petitioners in *Haring v. Prosise* argued that the respondent should be barred from litigating an issue that was never raised, argued or decided, simply because he had an opportunity to raise the issue in a previous proceeding. This Court rejected such an argument, stating that "[T]here is no justification for creating such an anomalous rule." We believe this Court's rationale in *Haring v. Prosise,* as set forth in the following declaration, is especially appropriate and pertinent to the issues in the within cause.

Adoption of petitioners' rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights. See *England v. Medical Examiners,* 375 U. S. 411, 416-417 (1964); *McClellan v. Carland,* 217 U. S. 268, 281 (1910); *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 40 (1909); *Cohens v. Virginia,* 19 U. S. 264, 404 (1821). Under petitioners' rule, whether or not a state judgment would be accorded preclusive effect by state courts, a federal court would be barred from entertaining a Section 1983 claim. The rule would require "an otherwise unwilling party to try [Fourth Amendment] questions to the hilt" and prevail in state court "in order to [preserve] the mere possibility" of later bringing a Section 1983 claim in federal court. *Brown v. Felsen,* 442 U. S., at 135. Defendants who have pleaded guilty and who wish to bring a Section 1983 claim would be forced to bring that claim in state court, if at all. Not only have petitioners failed to advance any compelling justification for a rule confining the litigation of constitutional claims to a state forum, but such a rule would be wholly contrary to one of the central concerns which motivated the enactment of Section 1983, namely, the "grave congressional concern that the state courts had been deficient in protecting federal rights." *Allen v. McCurry, supra,* at 98-99, citing *Mitchum v. Foster,* 407 U. S. 225, 241-242 (1972), and *Monroe v. Pape,* 365 U. S. 167, 180 (1961). See *Patsy v. Board of Regents,* 457 U. S. 496 (1982).

Thus, it follows from the clear and consistent pronouncements by this Court that the petitioner's state court action does not preclude her from seeking to recover

damages under 42 U. S. C., Section 1983, 1985, for the alleged federal constitutional violations that were never considered in the state proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL D. MIGRA,

Petitioner,

—v.—

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE GREATER CLEVELAND CHAPTER OF THE ACLU AS *AMICI CURIAE*

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. The Greater Cleveland Chapter of the ACLU is one of its affiliates. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against and remedy violations of constitutionally protected rights. Foremost among those mechanisms are the sanctions available under § 1983 against those state officials who abuse the official power entrusted to them.

The ACLU has frequently appeared before this Court in support of the historic role of 42 U.S.C. § 1983 in remedy-

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*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

ing violations of federal civil rights, and in deterring departure from constitutional standards.

STATEMENT OF THE CASE

The petitioner, Dr. Ethel D. Migra, had been employed by the Warren City School District Board of Education (hereinafter "Board") as Supervisor of Elementary Education on a yearly basis pursuant to written contracts for the school year commencing on August 13, 1976, and continuing without interruption for each year thereafter until June 15, 1979.[1] The petitioner's responsibilities included, among others, directing a commission appointed by the School Board to devise a voluntary desegregation plan for Warren City schools in compliance with the federal Emergency School Aid Act, § 718 of Title VII, 20 U.S.C. § 1617.[2] In this capacity, petitioner had actively and publicly supported controversial desegregation policies which the School Board

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1. Federal complaint (FC) at ¶ 7.

2. FC ¶ 8.

vehemently resisted.[3] As a result of her views, the superintendent of schools and some board members publicly circulated malicious rumors about the petitioner in an attempt to eliminate her from her position.[4]

On April 17, 1979, the School Board, at a regular meeting with all five members present, unanimously approved renewal of Dr. Migra's contract for the 1979-80 school year.[5] One week later, on April 24, 1979, the Board held a special meeting at which it rescinded the petitioner's contract renewal by a vote of three to one, without extending written notice to a fifth member of the Board as required under Ohio law.[6]

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3. FC ¶¶ 14, 15.

4. FC ¶ 16.

5. FC ¶ 16.

6. Cert. Petition at C-20.

As a result of the Board's rescission of her contract, the petitioner brought suit in the common pleas court of Trumbull County, Ohio against the Board and the Board members who voted to terminate her contract. Although pleaded in five counts, the complaint essentially asserted two causes of action: (1) breach of the employment contract by the Board;[7] and (2) conspiracy to interfere tortiously with the petitioner's contract.[8] The state judge, sua sponte, continued the tort claims while he held trial on the merits of the contract claim,[9] a procedure to which the defendants did not object. On March 20, 1980, the state judge entered a written opinion holding that the April 24, 1979 special

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7. State complaint (hereinafter "SC") Counts I - III.

8. SC Counts IV and V.

9. See Migra v. Warren City School District Board of Education, No. 79-CV-571 at 1 (Common Pleas Court, Trumbull County, March 20, 1970) (hereinafter "State Trial Court Opinion").

meeting was invalid, and that the Board therefore unlawfully breached the petitioner's contract. He ordered her reinstated with back pay.[10] On July 9, 1980, the state judge dismissed the reserved tort claims without prejudice, referring to them as the petitioner's "second cause of action."[11]

One day later the petitioner filed the instant action against the respondents here (School Board, Superintendent of Schools and individual Board members), in the United States District Court for the Northern District of Ohio under 42 U.S.C. §§ 1983 and 1985, alleging a conspiracy to violate her First, Fifth and Fourteenth

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10. State trial court opinion at 1-15. On appeal solely from the contract holding, the Ohio Court of Appeals for the Eleventh District eventually affirmed the state trial court's opinion, No. 3048 (Ohio Ct. App. 11th Dist., June 7, 1982). See also infra n.26.

11. Trial Court Judgment Entry, Case No. 79-CV-271 (July 9, 1980).

Amendment rights.[12] In essence, petitioner alleged that the respondents punished the exercise of petitioner's free speech and advocacy of desegregation[13] and falsely and maliciously stigmatized her resulting in the deprivation of her liberty interest in reputation and property interest in continued state employment,[14] without due process.[15]

On the respondent's motion for summary judgment, the federal district judge dismissed the complaint on res judicata grounds[16] reasoning that the petitioner

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12. FC at ¶ 1.

13. FC at ¶ 27.

14. FC at ¶ 24.

15. See also FC at ¶ 28.

16. The federal trial judge also dismissed the Fourteenth and Fifth Amendment due process claims on statute of limitations grounds, finding defamation the most analogous state cause of action to these claims and applying the one-year statute of limitations applicable to defamation (footnote continued on following page)

could have raised her federal civil rights claims in the state contract action.[17] The

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(footnote continued from preceding page) claims. These due process claims were apparently based on Board of Regents v. Roth, 408 U.S. 564 (1972) and Codd v. Velger, 429 U.S. 624 (1977) wherein this Court held that injury to reputation, committed under color of law accompanied by a resulting injury to more tangible interests such as continued employment, states a claim under the due process clause. Cf. Paul v. Davis, 424 U.S. 693 (1973). Since §§ 1985 and 1983 are silent on the question of a limitations period, 42 U.S.C. § 1988 requires in light of this deficiency that state law be applied to the extent it is not inconsistent with the purposes and policies underlying the civil rights acts. See Carlson v. Green, 446 U.S. 19, 23-25 (1980); Board of Regents v. Tomanio, 446 U.S. 478 (1980). While Ohio's one-year defamation statute of limitations might very well be appropriate under this standard, federal courts must also borrow state tolling rules under § 1988 to determine when a cause of action accrues. Tomanio, 446 U.S. 478 (1980). Since under the Ohio Supreme Court's recent pronouncement a dismissal without prejudice tolls the statute of limitations, Chadwick v. Barba Lou, Inc., 69 Ohio St.2d 222, 431 N.E.2d 660, 662-63 (1982), the state trial court's dismissal of the analogous state conspiracy claims without prejudice tolls the statute of limitations and the district court's dismissal on statute of limitations grounds was clearly erroneous. It is unclear, however, whether this issue is now before the Court.

17. Cert. Petition at C-17 - 31.

district court apparently discerned and applied a wholly federal rule of res judicata since he made no reference to 28 U.S.C. § 1738 or Ohio preclusion law. The Sixth Circuit Court of Appeals, in a one-page order, affirmed the judgment below on the district court's opinion.[18] This Court granted the petition for certiorari to review the question whether 28 U.S.C. § 1738 and the res judicata doctrine barred the petitioner's civil rights claims. 51 U.S.L.W. 3496 (January 11, 1983).

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18. Cert. Petition at B-16. The Sixth Circuit later denied the motion for rehearing. Cert. Petition at B-17.

SUMMARY OF ARGUMENT

Under 28 U.S.C. § 1738, the federal court should have looked to the Ohio rule of res judicata, and should not have barred petitioner's civil rights claims if Ohio would not have precluded them on the basis of petitioner's prior state court judgment on her contracts claim. Had the court done so, it would have found that Ohio still adheres to the traditional, narrow definition of "claim or demand" for res judicata purposes. Under the Ohio rule, petitioner's contracts judgment would not bar a second action on either her tort claims, which were severed from the contract claim, or the tort-related federal claims under 42 U.S.C. §§ 1983 and 1985.

Ohio law makes clear in another respect that petitioner's civil rights claims would not, under the circumstances of this case, be precluded by the contract judgment. The tort claims here were

severed and continued sua sponte by the trial court and were later dismissed "without prejudice", all without objection from the defendants at any point. Under those circumstances, petitioner could have refiled her tort claims without running afoul of Ohio's preclusion rules; and her federal civil rights claims, analogous to her tort claims and dependent on similar proof, would be subject to the same treatment under Ohio preclusion law.

Since Ohio law would not bar petitioner's civil rights claims, this Court need not and should not reach the further question whether, if Ohio would have precluded those claims, § 1738 should be construed to permit such full preclusion of civil rights claims. If it does so, however, amici submit that the policies of § 1738 and § 1983, considered together, require adoption of a rule of qualified preclusion, under which facts and issues

previously litigated would be subject to full collateral estoppel effect, but claims not raised or decided in state court proceedings could be subsequently reasserted in federal actions under 42 U.S.C. §§ 1983 and 1985. Considerations of comity support such an approach, which limits occasions in which federal courts will be called upon to decide questions of state law, and which will encourage exhaustion of state judicial remedies. Moreover, since state courts do not commonly preclude state claims which could have been but were not brought as pendent claims in federal civil rights actions, or which were asserted but over which the federal court declined to exercise jurisdiction, it would be anomalous for federal courts to grant greater preclusive effect to federal claims which were not raised in state court.

Considerations of judicial economy

underlying § 1738 also militate in favor of only a qualified rule of preclusion. The state judicial exhaustion which such a rule will induce may well reduce the number of federal civil rights claims asserted in courts generally, and full preclusion will undoubtedly sharply increase federal caseloads.

Finally, the basic policies underlying § 1983 suggest that Congress did not intend to foreclose litigants from asserting federal claims in federal courts merely because they chose to exhaust state judicial remedies. Indeed, given the narrow res judicata definition of a single "claim or demand" in the mid-nineteenth century, see Cromwell v. County of Sac, 94 U.S. 351, 354 (1877), it is clear that Congress would not have expected that a state judgment on a claim arising only under local law would preclude a subsequent action raising constitutional

claims that had not been presented to or decided by a state court.

I. SECTION 1738 DOES NOT BAR PETITIONER'S CONSTITUTIONAL ACTION SINCE OHIO WOULD NOT ACCORD PRECLUSIVE EFFECT TO HER STATE CONTRACTS JUDGMENT.

By its terms, 28 U.S.C. § 1738 requires federal courts to give the same effect to state court judgments "as they have by law or usage in the courts ... from which they are taken." 28 U.S.C. § 1738; see also Kremer v. Chemical Construction Co., ___ U.S.___ , 102 S.Ct. 1883, 1889, reh. denied 103 S.Ct. 20 (1982) ("Section 1738 ... commands a federal court to accept the rules chosen by the state from which the judgment is taken."); Allen v. McCurry, 449 U.S. 90, 96 (1980). Thus, if petitioner establishes that Ohio would not accord res judicata effect to her present action, its preclusion is not justified by the clear language of section

1738.[19] Nevertheless the federal district court judge did not even consider Ohio law in granting summary judgment to respondents on the basis of res judicata.[20]

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19. In Point II below we consider whether even if a state would otherwise preclude the subsequent assertion of claims that could have been raised in a prior proceeding, § 1738 requires doing so, if the subsequent claims are constitutional claims over which Congress vested the federal courts with jurisdiction in 42 U.S.C. § 1983 and § 1985. For convenience's sake, amici will hereafter sometimes refer to petitioner's federal claims as § 1983 claims, since the inclusion of a § 1985 claim makes no difference in the present context.

20. In holding that petitioner's § 1983 claims were precluded by res judicata, the district court relied solely on two Sixth Circuit cases and made no apparent attempt to discern Ohio state law. Cf. Bishop v. Wood, 426 U.S. 341, 345-47 (1976). Only one of those, Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970), considered Ohio law and the case it relied on, Burton, Inc. v. Durkee, 162 Ohio St. 433, 123 N.E.2d 432 (1954), was inapposite, since it involved only collateral estoppel (issue preclusion), not claim preclusion, which is at issue here. The leading Ohio cases on res judicata, by contrast, which are addressed infra at 16-18, were not cited or discussed in Coogan. There is no question, of course, but that issue preclusion is fully applicable here. Allen v. McCurry, supra.

Had it done so, it would not have granted defendants' motion to dismiss on grounds of res judicata. Under Ohio law, petitioner's prior state court judgment on her contracts claims would not preclude her subsequent action on constitutional claims arising from the same facts, especially under the circumstances of this case.

A. Under Ohio Law Petitioner's Constitutional Claims Are A Separate Cause Of Action Arising Out Of The Same Transaction As Her Contract Claims And Are Therefore Not Barred Under Ohio Law Of Res Judicata.

The traditional formulation of res judicata is that

> a judgment estops not only as to every ground of recovery or defense actually presented in this action, but also as to every ground which might have been presented ... when applied to the demand or claim in controversy ... But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted.

Cromwell v. County of Sac, 94 U.S. 351, 353 (1877). This formulation, valid generally and in Ohio, disguises a critical area of disagreement which has led to a sharp diversity of state opinion concerning the actual application of res judicata. As this Court has observed, the scope of res judicata is correspondingly greater or smaller depending on how broadly a state defines "the definition of 'claims' in bar and merger contexts." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 327 (1971). See generally Currie, Res Judicata, The Neglected Defense, 45 U.Chi.L.Rev. 317, 338-342 (1978). The lower court's application of res judicata here was erroneous precisely because it failed to inquire into how Ohio defines a cause of action for res judicata purposes, and to recognize that Ohio adheres to the traditional narrow definition of cause of action under which the judgment on peti-

tioner's contract action would not have barred subsequent state-court litigation of her tort claims, and would not bar the subsequent litigation of her constitutional claims in either state or federal court.

Analysis begins with the state judge's own characterization of petitioner's claims. He referred to petitioner's tort claims as her "second cause of action", State Court Opinion at 1, and sua sponte continued those claims while he held trial on the merits of the contract claim, a procedure to which defendants did not object.

Moreover, under Ohio rules, in sharp contrast to the more "modern" view taken by the Restatement (Second) of Judgments § 61 (1980), one transaction may give rise to more than one cause of action. As stated in Norwood v. MacDonald, the leading Ohio case, "[A] judgment in a former action does not bar a subsequent action where the cause of action prose-

cuted is not the same, even though each action relates to the same subject matter." 142 Ohio St. 299, 52 N.E.2d 67 (1942), ¶ 2 of syllabus; Henderson v. Ryan, 13 Ohio St. 2d 31, 37-38, 233 N.E.2d 503, 510-11 (1968)(where attorney was codefendant in previous fraud action, second action by same plaintiff against attorney for negligence is not precluded though arising from the same transaction).[21] See also

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21. In Henderson, the Court noted in dicta that Ohio's trend toward more liberal joinder furthered judicial efficiency. Henderson, 13 Ohio St. 2d at 38. The Court expressly found "still valid", however, the "primary right -- primary duty theory" under which one set of facts may give rise to two causes of action, though under the "transaction" theory only one cause of action would arise. Id. at (509-510); see also Sharp v. Shelby Mutual Ins. Co., 15 Ohio St. 2d 134, 140-141, 239 N.E.2d 49, 53-54 (1968)(plaintiff's claims are different causes of action under either "same evidence" or "single factual unit" tests). These 1968 cases are the Ohio Supreme Court's most recent pronouncements on the definition of cause of action.

City of Columbus v. Union Cemetery Association, 45 Ohio St. 2d 47, 50 341 N.E. 2d 298, 301 (1976) "The Ohio views on res judicata and estoppel by judgment are well-expressed in Norwood ... [quotes § 2 of syllabus] ..."); Johnson's Island, Inc. v. Board of Township Trustees of Danbury Township, 69 Ohio St. 2d 299, 305, 431 N.E.2d 672, 674 (1982) (follows Norwood for Ohio res judicata rules).

Ohio thus follows the traditional view of res judicata as stated in Cromwell v. County of Sac, 94 U.S. at 354, on which Norwood expressly relied:

> **It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second**

> action between the same parties as a different demand .. [G]rounds of recovery or defense in one action, ... may not exist in another action upon a different demand ... a party acting on consideration like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction. [emphasis added.][22]

For example, the Ohio Supreme Court recently found that res judicata did not bar a second suit between the

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22. Cromwell is cited in Norwood at 142 Ohio St. 229, 52 N.E.2d 67, 71. The narrow traditional definition of cause of action is also reflected in United States v. Moser, 266 U.S. 236 (1924), United States v. Stone & Downer Co., 274 U.S. 225 (1927), and Commissioner v. Sunnen, 333 U.S. 591 (1948).

the same parties where both suits concerned a pension trust arranged by the employer, but where the "pivotal issue" of the first suit was different from that of the second. Luli v. Sun Products Corp., 60 Ohio St. 2d 144, 150, 398 N.E. 2d 553, 557 (1979); see also Sharp v. Shelby Mutual Ins. Co., 15 Ohio St. 2d 134, 140-141, 239 N.E. 2d 49, 53-54 (1968) (wrongful withholding of insurance payment caused plaintiff two separate injuries which may be maintained separately).

Analysis of Ohio law makes clear not only that a single event can give rise to separate causes of action which need not be brought in a single lawsuit -- unlike the Second Restatement view -- but also that the particular claims petitioner sought to litigate in federal court, which had

not been litigated in state court, in fact constitute a "different claim or demand" under Ohio law.

Ohio has a well-developed test for identity of causes of action, and under that test petitioner's current action is not identical to her state court claims. The inquiry includes several questions: whether the same demand is involved, i.e., tort or contract injuries; whether the same evidence will sustain each cause of action; and whether the claims in each action accrued at the same time. Norwood v. McDonald, 142 Ohio St. 299, 311, 52 N.E. 2d 67, 74 (1943); Francis H. Fisher, Inc. v. Midwesco Enterprise, Inc., 477 F.Supp. 169, 173-73 (S.D. Ohio 1979), aff'd mem. 657 F.2d 267 (6th Cir. 1981) (applying Ohio res judicata law); Falk v. United States,

375 F.2d 561, 564 (6th Cir. 1967) (where cause of death litigated in state court was different from that alleged in federal tort claim action, Ohio law of res judicata does not bar federal action).

That constitutional claims involved in the §1983 action are not the same as the claim adjudicated in petitioner's favor in the contract action is evidenced by the trial court's treatment of petitioner's analogous tort claims as separate and severable. The contract issue concerned only whether the Board had breached its contract with petitioner, or had violated Ohio's Sunshine Law by meeting in secret. The contract was one obligation between petitioner and the Board. A second obligation existed, however, which petitioner alleges the Board members violated

by their conspiracy to penalize her exercise of First Amendment rights. Under Ohio law, where one action causes a breach of two duties, one in contract and one in tort, separate actions may be maintained. "Although the same episode forms the basis of the two recoveries, they do not grow out of the breach of the same duty." Midvale Coal Co. v. Cardox Corporation, 152 Ohio St. 437, 451, 89 N.E.2d 673, 680 (1949), (overruled on other grounds, Fischer Construction Co. v. Strand, 175 Ohio St. 31, 191 N.E. 2d 166 (1963)), ¶4 of the syllabus; see also Henderson v. Ryan, 13 Ohio St. 2d at 35 (" ... Defendant committed two wrongful acts, each constituting a cause of action ... the reasoning of the case, that two duties were breached, ... is still valid.")

So far as "whether the same evidence would sustain both" causes of action is concerned, the "best and most accurate test of identity of causes of action," Fisher, 422 F. Supp. at 172-173; Norwood, 142 Ohio St. at 311; see also I Ohio Jur. 3d 466, Actions, § 88 (1977), a firm conclusion of separate causes here is also required. The contract trial adjudicated only whether the Board of Education could revoke its renewal of Dr. Migra's contract, and concluded that it had breached its contract obligations to her. The question whether individuals on the Board conspired to induce this breach, and whether the purpose of the conspiracy was to punish the exercise of petitioner's First Amendment rights, concerns a different injury which requires different evidence, as the state court judge impli-

citly recognized by severing the tort claims and trying the contract issue alone first.

The third element of the Norwood test also indicates the separate nature of the claims. The right of action on the non-renewal of contract issues accrued only on April 17, but the violation of petitioner's First Amendment rights began when defendants began their alleged efforts to penalize her for expressing support for the desegregation plan.[23]

In short, despite the district court's view, Ohio law, exemplified by Norwood and its progeny, makes plain that petitioner's § 1983 claims constitute a separate claim or demand from the contract claim on which she previously had prevailed. Accordingly, Ohio would not require her to bring the civil rights claims

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23. FC ¶¶ 16, 22, 25, 27 (allegations of First Amendment claim).

with her contract claim, and would not give the contract claim a res judicata effect of barring a subsequent action on the constitutional claims, (whether they were brought independently or together with pendent state tort claims which had been dismissed without prejudice).

B. Under Ohio Law, As In Most Jurisdictions, A Judgment On One Claim Will Not Preclude A Subsequent Action On A Related Claim If The Court Has Ordered, Or The Parties Agreed That The Claims Be Severed.

The state court judge sua sponte separated petitioner's state tort claims before the trial of the contract action when, apparently without objection from either party, he "reserved and continued" that issue.[24] That continuance of the

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24. Ohio law vests the state court with discretion to continue a case to provide the parties a reasonable opportunity to try it on the merits. Curtis v. Chiaramonte, (footnote continued on following page)

tort claims had the practical effect of ordering a separate trial of that issue, since the contract claims proceeded immediately to trial and judgment. When the state court judge wrote an opinion on the contract claims, he again specifically reserved the tort claims; and they were thereafter dismissed, again without objection by either party, "without prejudice."[25]

(footnote continued from preceding page) 53 Ohio St. 2d 15, 16, 371 N.E.2d 839, 840 (1978). The court may continue "upon its own motion" to serve "the interest of substantial justice", Parsch Lumber Co. v. McGrath, 37 Ohio App. 37, 173 N.E. 629 (1930), or the administration of justice, Cincinnati Car Co. v. Snyder, 37 OCC 250, 254 (1915). Under Ohio Civil Rule 42(b), a separate trial may be ordered for "convenience", if "conducive to expedition and economy", or "to avoid prejudice", Civ.R.42 Rules Governing the Court of Ohio (1982), but the parties' due process rights to a hearing must be adequately protected. Dir. of Highways v. Kleines, 38 Ohio St. 2d 317, 320, 313 N.E.2d 370, 372 (1974).

25. In a recent opinion which evidences Ohio's liberal policy toward reinstituting actions dismissed without prejudice, the Ohio Supreme Court quoted Black's Law Dictionary, 5th Ed., to the effect (footnote continued on following page)

Under these circumstances, petitioner's tort action was plainly not merged in the contract judgment, and she could not be denied a subsequent trial on the merits of the tort claims.

Ohio law (and general principles of res judicata as well) recognize that since the rule against splitting of claims is for the primary benefit of defendants, where defendants acquiesce in the splitting they are barred from raising the defense of res judicata. Shaw v. Chell, 176 Ohio St. 375, 199 N.E.2d 869 (1964) (separate action for person injuries not precluded by previous action for property damage from the same accident, since defendant failed to object); Nationwide

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(footnote continued from preceding page) that the inclusion of "without prejudice" in a dismissal order "show[s] that the judicial act is not intended to be res judicata of the merits of the controversy". Chadwick v. Barba Lou, Inc., 69 Ohio St. 2d 222, 227, n.4, 431 N.E. 2d 660, 662-63 n.4 (1982).

Insurance Co. v. Steigerwalt, 21 Ohio St.2d 87, 255 N.E.2d 570 (1970)(same). Cf. Restatement (Second) of Judgments, § 26(a). Failure to object to the splitting of plaintiff's claim is tantamount to consent. Shaw, supra; Nationwide, supra. When a defendant fails to object he is considered to have implicitly consented to the maintenance of separate actions. Shaw, 176 Ohio St. at 380, Mayfield v. Kovac, 41 O. App. 310, 314, 181 N.E. 28, 29 (1932). Cf. Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir.1976)(no preclusion where issues presented in federal court had been expressly excluded from consideration in

state court).

Defendants made no attempt to object to the state judge's continuance of the tort claim. Nor did they seek to have the tort claim dismissed with prejudice. Indeed, defendants' present claim that they viewed the tort claim as part of the contract issue is controverted by their own behavior. After the contract judgment was adjudicated, but months before the tort claim was dismissed, defendants sought appellate review of the contract claim alone, viewing plaintiff's recovery on that claim as a final judgment.[26]

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[26]On the first attempted appeal from the state court contract judgment, the Ohio Court of Appeals for the Eleventh District dismissed the appeal for lack of jurisdiction, finding that the appeal was not taken from a final judgment since the reserved [footnote continued on following page]

Similarly, under Ohio law, a dismissal without prejudice is not a bar to a subsequent action on the same cause of action Board of Health of St. Bernard v. City of St. Bernard, 19 Ohio St.2d 49, 52 249 N.E.2d 888, 891 (1969) (where first action which had proceeded to argument was dismissed without prejudice, Appeals Court's dismissal of second action on basis of res judicata must be reversed); Moherman v. Nichols, 140 Ohio

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[footnote continued from preceding page] tort claims were pending when the appeal was docketed in April, 1980. After this decision, the state trial judge post-dated the order dismissing the tort claims without prejudice from July 9, 1980 to October, 1981, see state Trial Court Judgment Entry, Case No. 79-CU-571 (July 9, 1980), apparently to enable the defendants to file a second appeal within the 30-day limit under Ohio law.

450, 45 N.E.2d 45 (1942) (reversing dismissal of second action on basis of res judicata). The parties are free to litigate the matter as though the dismissed action had not been commenced, id.; see also Eaton v. French, 23 Ohio St. 560, 562 (1873), except that under Rule 41(a)(1) an action may not be re-instituted after two dismissals. Where an action includes multiple claims and some are dismissed, the dismissal applies only to those specific claims and the other claims remain before the court. State ex rel. Potain v. Mathews, 59 Ohio St. 2d 29, 33, 391 N.E. 2d 343, 345 (1979).

Indeed, to this extent, the Ohio view is no different from the view of most courts, under which after a dismissal of one of several claims

without prejudice, a judgment on the other claims is not res judicata to the federal action on the dismissed claim. See Lemon v. Druffel, 253 F.2d 680, 685 (6th Cir. 1958), cert. denied 358 U.S. 821 (1958); Abramson v. University of Hawaii, 594 F.2d 202, 207 (9th Cir. 1979) (where state court dismissed sex discrimination claims without hearing them but adjudicated contract claims, federal court is not barred by Hawaii res judicata rules from hearing her constitutional claims); Minker v. St. Louis-San Francisco Railway Co., 574 F.2d 1056, 1059 (10th Cir. 1978)(where some, but not all claims were dismissed without prejudice in state court, under Oklahoma rules the dismissed claims may be heard in federal court).

Under these circumstances, where

it is plain that Ohio would not hold petitioner precluded from bringing a subsequent action on tort claims which had been severed, continued, and finally dismissed without prejudice, it follows that Ohio would accord no greater preclusive effect to petitioner's §1983 claims, which are analogous to the tort claims and would have depended on identical proofs. None of the policies embodied in a state's preclusion law would suggest barring the §1983 claims here where the trial judge's actions -- to which defendants did not object -- would have required an additional trial on the related tort claims in

any event.[27]

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27. Had petitioner originally joined civil rights claims with her tort and contract claims in state court, there can be no doubt on this record that the civil rights claims would have been severed and continued along with the tort claims, since they were so analogous and depended -- unlike the contract claim -- on similar proofs.

Indeed, since the state trial judge appeared entirely unwilling to consider Dr. Migra's tort claims it is very well possible that precluding the virtually identical civil rights claims would deny her the full and fair opportunity to raise those claims that due process requires. See Allen v. McCurry, 449 U.S. at 95 n. 7.

II. A FEDERAL COURT MAY ADJUDICATE FEDERAL CONSTITUTIONAL QUESTIONS WHICH WERE NEITHER RAISED NOR DETERMINED IN A PRIOR STATE PROCEEDING

As amici have shown, this case must be resolved in petitioner's favor by resort to settled Ohio res judicata principles.[28] Since neither this

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28. In Allen, this Court did not determine how res judicata should apply in federal courts considering the effect to be given state decisions. 449 U.S. at 93 n.2, 105 n.25. It therefore did not determine whether in considering a state judgment §1738 limits federal courts to considering only the preclusive rules of the rendering state, an approach possibly relied on in Kremer v. Chemical Construction Co., 72 L.Ed.2d 262, 271 (1982), or permits consideration of general principles as well. See Montana v. United States, 440 U.S. 147 (1979) (analyzing preclusive effect of state judgment only under general principles, without addressing state law). Amici suggest that this issue need not be decided here, since, for the reasons presented supra, preclusive effect would not be warranted in either event.

Court nor any other has ever held that §1738 requires a federal court to accord greater preclusive effect to a state court's judgment than would courts of the state itself, the judgment below must be reversed. Consideration of whether federal courts should grant lesser preclusive effect to prior state judgments in subsequent §1983 actions would be inconsistent with this Court's well-established policy of avoiding resolution of difficult federal questions when not necessary to a decision of the case. See Minnesota v. National Tea Co., 309 U.S. 551, 555 (1940); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Nevertheless, if such an inquiry is undertaken here, amici submit that

considerations of federal-state comity, judicial economy and the legislative intent behind §1983 make clear that §1738 does not bar the assertion of §1983 constitutional claims in federal court so long as they were neither presented nor considered in prior state proceedings.

There are three ways to resolve the conflict between the policies inherent in §1738 and §1983. The first approach would treat §1983, like federal habeas corpus, as an exemption from traditional preclusion law because of the importance of the rights at issue. That approach, however, was rejected, largely on grounds of statutory construction, in Allen v. McCurry, supra.

The second approach would subject §1983 actions to full issue and claim preclusion without regard to the sig-

nificance of the rights at issue. Prior decisions of this Court, however, appear to reject this approach as well. See, e.g., England v. Board of Medical Examiners, 375 U.S. 411 (1964); Wooley v. Maynard, 430 U.S. 705 (1977); cf. Patsy v. Board of Regents, ___ U.S. ___, 73 L.Ed.2d 172 (1982); Mitchum v. Foster, 407 U.S. 225 (1972); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). The holdings and reasoning of each of these cases make clear that this Court has discerned policies in § 1983 which, in certain circumstances at least, outweigh the judicial economy interests which underlie the preclusion doctrines.

The third possible approach to § 1738 and § 1983 is to fashion a doctrine of qualified preclusion which furthers the policies of both statutes by according full collateral estoppel effect to

facts and issues previously decided under Allen v. McCurry, but which does not preclude the assertion of a federal constitutional claim in federal court merely because it might have been asserted in an earlier state proceeding. In short, while collateral estoppel would operate in § 1983 cases, res judicata would not act to bar the assertion of a federal constitutional claim. This Court has suggested such a qualified preclusion approach in the past.[29]

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29. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977)(deciding constitutional claim in federal action notwithstanding three prior state proceedings in which the plaintiff could have raised his constitutional claim); Florida ex rel. Hawkins v. Board of Control, 355 U.S. 839 (1957) (denying petition for certiorari from state supreme court raising constitutional claim not raised in the state proceedings "without prejudice to petitioner's seeking relief in an appropriate United States district court"). See also Allen v. McCurry, 449 U.S. at 95 n.7 (suggesting the existence of factors that might require exceptions to normal preclusion rules in particular cases). But see Mertes v. Mertes, 411 U.S. 961 (1973); White v. Howard, 347 U.S. 910 (1954).

It is the rule of the Second Circuit[30] and one which other circuits have utilized as well.[31] Qualified preclusion furthers

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30. Grossman v. Axelrod, 646 F.2d 768 (2d Cir. 1981); Tomanio v. Board of Regents, 603 F.2d 255 (2d Cir. 1979), rev'd on other grounds 446 U.S. 478 (1980); Ornstein v. Regan, 574 F.2d 115, 119 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Education of New York City, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

31. See, e.g., New Jersey Education Assn. v. Burke, 579 F.2d 764, 774 (3d Cir.), cert. denied, 439 U.S. 894 (1978)("To hold that state court litigation bars a federal forum from deciding any claims which might have been raised before the state court would turn the state court into quicksand. It would not only serve as a trap for unwary plaintiffs who desire a federal tribunal but encourage competently represented litigants to forego any venture into state jurisdiction to exhaust state administrative and judicial procedures on pain of losing their right to a federal hearing"); Maher v. City of New Orleans, 516 F.2d 1051, 1056-59 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); Blunt v. Marion City Board of Education, 515 F.2d 951, 956 (5th Cir. 1975); Mack v. Florida Board of Dentistry, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 (1971); Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Mulligan v. Schlacter, 389 F.2d 231 (6th Cir. 1968); (footnote continued on following page)

the policies underlying § 1738 by forbidding time-consuming relitigation of facts and preventing federal judgments which might contradict those already entered by state courts, while furthering the policies of federalism by: (1) limiting federal court adjudication of state law issues; (2) encouraging the exhaustion of state judicial remedies; and (3) honoring the congressional determination that there should be a federal judicial forum for the adjudication of previously undecided questions of federal law.

(footnote continued from preceding page) Bickham v. Lashof, 670 F.2d 1238, 1248 (7th Cir. 1980); Kurek v. Pleasure Driveway & Park Dist., Etc., 557 F.2d 580 (7th Cir. 1977); Goodrich v. Supreme Court of State of South Dakota, 511 F.2d 316, 318 and n.8 (8th Cir. 1975); Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971); but see Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1351 (9th Cir. 1981)(state court judgment denying relief on tort theories precludes consideration of constitutional claims arising from same facts). cert. granted on other grounds sub nom. Kush v. Rutledge, 50 U.S.L.W. 3998.27 (July 2, 1982); Coogan v. Cincinnati Bar Assn., 431 F.2d 1209 (6th Cir. 1970); Robbins v. District Court, 592 F.2d 1015 (8th Cir. 1979).

As amici now show, the important policies this Court has discerned in both § 1738 and § 1983 require permitting the litigation in federal court of § 1983 claims which have not previously been submitted to nor decided by state courts, so long as facts and issues previously decided are accorded their proper collateral estoppel effect. Moreover, to the extent that Congress can be said to have spoken on that matter, there is every reason to believe that the approach suggested here is the one which Congress presumably favored in 1871.

a. The notion of comity mandates respect for separate state and national functions, "sensitivity to the legitimate interests of both state and national government" and requires the "national government, anxious though it may be to vindicate and protect federal interests ... to do

so in ways that will not unduly interfere with the legitimate activities of states." Younger v. Harris, 401 U.S. 37, 44-45 (1971). Where a state court has actually adjudicated a claim or issue, application of collateral estoppel through § 1738 to preclude subsequent federal litigation that might reverse or otherwise call the correctness of the state court ruling into question serves to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system". Kremer v. Chemical Construction Co., 72 L.Ed.2d 262, 271 n.6 (1982); Allen, 449 U.S. at 96.[32]

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32. By contrast, federal courts declining to apply claim preclusion would not be "second-guessing [state] judges, which, were it so, would indeed be offensive to accepted principles of federal-state comity, ... common sense and judicial modesty." Tomanio v. Board of Regents, 603 F.2d 255, 258 n.1 (1979), rev'd on other grounds, 446 U.S. 478 (1980). Similarly, there is no issue in this case, as there
(footnote continued on following page)

However, comity is a two-way street requiring state courts to accord appropriate respect to the special function and particular expertise of federal courts. Just as "federal courts should not be overeager to hold on to determination of issues that might be more appropriately left to settlement in state court litigation", United Mine Workers v. Gibbs, 383 U.S. 715, 726 n.15 (1966) quoting Strachman v. Palmer, 117 F.2d 427, 431 (1st Cir. 1949), "recognition of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law", England v. Board of Medical Examiners, 375 U.S. 411, 415-16 (1964).

(footnote continued from preceding page) was for example in Allen, of an attempt to collaterally attack a judgment or decision of a state court. The plaintiff here prevailed in the state action. Cf. Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923).

Accordingly, while individual considerations not present here, such as substantial overlap in proof,[33] might in rare cases suggest the prudent adjudication of both state and federal claims in one forum, appropriate concern for federal-state c...

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33. Of course the possibility of vexatious or wasteful litigation through the redetermination of issues necessarily decided in the state proceeding is insubstantial since the collateral estoppel doctrine is fully applicable. See Allen, 449 U.S. 90 (1980). Indeed, in this case, since the plaintiff prevailed in the prior state court action, the district court will have to consider on remand whether under Ohio law she may rely on collateral estoppel "offensively" to preclude relitigation of issues necessarily decided in the state contract case. Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

ity militates against res judicata rules that would require such an approach. This conclusion is specifically reinforced by England v. Board of Medical Examiners, 375 U.S. 411 (1964), which permits a plaintiff in federal court whose cause of action has been remitted to the state court for determination of unsettled issues of state law under Pullman-type abstention[34] to reserve a federal forum for the resolution of federal constitutional claims, and United Mineworkers v. Gibbs, 383 U.S. 715 (1966), which permits federal courts to decline to adjudicate pendent state claims arising from the same operative facts as federal claims, without prejudice to the subsequent assertion of the state claims in state court. Indeed, state courts have refused to apply claim preclusion to state claims which were never even presented to the federal court for adjudication in prior federal

34. See Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941).

litigation, on the ground that the federal court would have declined discretionary pendent jurisdiction over the state claims under Gibbs. See, e.g., Pope v. City of Atlanta, 240 Ga. 177, 179-80, 240 S.E.2d 241, 243 (1977); see generally Rest.2d of Judgments, § 61.1, comment e (Tent. Draft No. 5, 1978) at 160. Thus interpreting § 1738 as precluding the assertion of federal claims which could have been raised in related state proceedings would in many instances provide the anomalous result of requiring federal courts to accord greater preclusive effect to state court judgments than the state courts would have given federal court judgments, had the order of adjudication been reversed.

A rule of qualified preclusion which did not bar the subsequent federal court adjudication of constitutional claims not previously raised nor decided by state

courts would further principles of comity in another way as well. Although this Court, looking to the legislative history of § 1983, has held that litigants are not required to exhaust state judicial remedies, it has been commonly recognized that comity is in fact furthered where such exhaustion, even if not required, nevertheless takes place. See, e.g., McNeese v. Board of Education, 373 U.S. 668, 679 (1963)(Harlan, J., dissenting); cf. Patsy v. Board of Regents, 73 L.Ed. 2d at 188 (O'Connor, J., concurring). As Justice Stevens observed, in a slightly different context, comity is furthered by a decision "to bring suit in the state courts first; for such a decision gives the State an opportunity to correct, through construction of state law, a potential constitutional error, and may obviate entirely any need to present the claim to a federal court." Board of

Regents v. Tomanio, 446 U.S. 478, 493 (1980)(concurring opinion). The strict res judicata rule respondents urge here will in all likelihood severely impede such voluntary resort to state courts and lead many litigants to proceed directly to federal court, in an attempt to litigate both federal and state claims simultaneously in federal court. A preclusion rule which results in enhanced federal court caseloads, while multiplying the occasions for federal courts to rule on difficult and close questions of state law, can hardly be said to further principles of comity.[35]

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35. Federal courts may, of course, react to an attempt to litigate state claims in federal court by declining to entertain pendent jurisdiction, abstaining, or, if possible, certifying doubtful questions of state law to state courts. In preclusion terms, of course, such activity would permit a litigant to pursue state claims in state court and federal claims in federal court free from collateral estop-
(footnote continued on following page)

Thus, permitting plaintiffs to proceed in state court first without subsequent claim-preclusion consequences might very well "spare the federal courts some unnecessary work ... reduce the strain on federal-state relations and ease the task facing the [federal] courts," Tomanio, 446 U.S. at 495-96 (Brennan, J., dissenting), particularly at a time when the burden on federal courts and ultimately on this Court is at its apogee.

(footnote continued from preceding page) pel or res judicata. E.g., England; Gibbs. Where, as here, a litigant has voluntarily taken his state cliam to state court, he should not be penalized by being wholly precluded from raising a timely federal constitutional claim in federal court, so long as the fact-finding of the state court is respected. It makes little sense to treat a litigant who voluntarily seeks to advance federalism policies more harshly than a litigant who seeks to litigate state claims in federal court.

b. The primary purpose underlying the judicially created res judicata doctrine is a concern for the efficacious use of judicial resources. See generally Allen v. McCurry, 449 U.S. at 94. The doctrine also relieves parties of the cost and vexation of multiple lawsuits, and encourages reliance on adjudication by preventing inconsistent judgments. Montana v. United States, 440 U.S. 147, 153-154 (1979); Baltimore S.S. Co. v. Phillips, 274 U.S. 136, 320-21 (1927).

In light of the decision by the state court, to which defendants did not object, reserving determination of the tortious conspiracy claims to a subsequent trial, those concerns have no application in the present case. Nor, apart from the specific facts of this case, do those concerns support the strict rule of preclusion of all federal claims which might have been raised in a state court

action, as respondents urge. To the contrary, the policies this Court has discerned behind res judicata support a rule affording strict fact and issue preclusion, but not claim preclusion, to prior state proceedings.

As this Court observed in Allen, the principal benefits of preclusion arise from "collateral estoppel in particular." 449 U.S. at 94. The saving of judicial time and effort is apparent in preventing relitigation of issues and facts; and if petitioner's § 1983 claims proceed in federal court, that court will be spared any duplicative effort in that regard. Allen v. McCurry, supra. But there is no reason to suppose that the state court would have resolved petitioner's First Amendment claims, had they been presented in the state court, more quickly than could a federal court. Like the tort claims which the state judge decided to try after the contract claims,

in a separate proceeding, the First Amendment claims raised substantially different issues than the contract claim which had previously been resolved. Moreover, they involved law with which many federal judges are substantially more familiar than their state counterparts.

c. Finally, the policies embodied in § 1983, although not sufficient to imply a wholesale exemption of civil rights actions from § 1738, provide strong reasons, along with principles of comity and judicial economy, to support a rule declining to bar § 1983 claims not previously decided by state courts, so long as any facts or issues decided are subject to collateral estoppel.

First, and most importantly, it seems clear that the 42nd Congress, which enacted what is now § 1983, would have assumed that resolution of state claims

in a state court would not bar a subsequent action raising constitutional claims arising from the same factual situation. See Cromwell v. County of Sac, 94 U.S. at 353 (1877); 1 H. Herman, Law of Estoppel and Res Judicata §§ 92, 96 ("cause of action"), 98, 103, 111 ("issue") (1886); Developments in the Law -- Res Judicata, 65 Harv.L.Rev. 818, 841-43 (1952); Allen v. McCurry, 449 U.S. at 114 (Blackmun, J., dissenting). Since the question at issue here concerns the circumstances in which the 42nd Congress intended plaintiffs with constitutional claims to have a federal forum, and since in 1871 plaintiffs in petitioner's shoes would have had one, that intention should be controlling here. It does no violence to § 1738 to so construe it, since its framers, like the Court nearly one hundred years later, would similarly have considered a cause of action arising out of the Constitution a different claim from

a state contracts action, (as Ohio still does today).[36]

Second, declining to bar § 1983 actions in federal court because of a related state judgment raising different claims honors the clear intention of the 42nd Congress to afford a federal forum for the resolution of federal rights. It is not sur-

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36. We do not believe that this Court's observation in Allen, 449 U.S. at 97, that there was no mutuality of estoppel in 1871 implies that the expectations of the 42nd Congress are not relevant. Assuming, as the Court seems to have, that the state police defendants in Allen were privies to the state in the previous criminal judgment, traditional principles of collateral estoppel in 1871 would have led to the same result as modern doctrine. Here, by contrast, that is not so: although the most recent Restatement would require all causes of action arising from a single factual incident to be brought in a single lawsuit, that was assuredly not the law in 1871. Cromwell v. County of Sac, supra.

prising or unique for Congress to have insisted on such a preference. In an analogous area, for example, it has long been clear that plaintiffs with antitrust claims over which Congress provided exclusive federal jurisdiction may first pursue state breach of contract actions as well. See, e.g., Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), cert. denied 350 U.S. 825 (1955).

Just as the important policies behind res judicata are not harmed by such a procedure, which simply honors a congressional preference for federal resolution of certain kinds of claims without implying disrespect of state courts, so too the policies behind § 1983, canvassed in such cases as Mitchum v. Foster, England v. Board of Medical Examiners, Monroe v. Pape, and Patsy v. Board of Regents are not violated by the rule amici urge here.

"Congress clearly conceived that it was altering the relationship between the states and the nation with respect to federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." Mitchum v. Foster, 407 U.S. 225, 242 (1972). See also Monroe v. Pape, 365 U.S.167, 180 (1961); Harrison v. NAACP, 360 U.S. 167, 181 n.11 (1959) (Douglas, J., dissenting). Congress recognized that "federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities [and those such as the petitioner here who speak out in minorities' behalf] than elected state judges." England, 375 U.S. at 427 (Douglas, J., concurring). Accordingly, the legislative debates lead-

ing up to the passage of § 1983's predecessor are replete with references to the special role of federal courts to protect constitutional rights. See Steffel v. Thompson, 415 U.S. 452, 472-73 (1974).

Representative Coburn stated most eloquently:

> The United States Courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage ... we believe we can trust our United States courts, and we propose to do so.

Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

This view was echoed by Representative Lowe:

> [R]ecords of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] ... The case has arisen ... when the federal government must resort to its own agencies to carry its own

> authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.

Cong. Globe, 42d Cong., 1st Sess., 374-376 (1871). See also Allen, 449 U.S. at 106-110 nn.3-9 (Blackmun, J., with Brennan and Marshall, J.J., dissenting); Mitchum, 407 U.S. at 238-242 nn.28-32.

While this well-established legislative history, as recognized and developed by this Court, may not be sufficient to imply the wholesale repeal of § 1738 in civil rights actions, it is still a significant consideration which along with notions of comity, federalism and judicial economy, supports construing § 1738 and § 1983 together not to preclude federal court adjudication of § 1983 claims not previously presented to or decided by state courts.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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No. 82-738

In the

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL D. MIGRA,

Petitioner,

vs.

THE WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

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With the consent of the Petitioner and the Respondents, the Mandel Legal Aid Clinic submits this brief as amicus curiae in support of the Petitioner, Dr. Ethel D. Migra.

STATEMENT OF INTEREST

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, in existence since 1959, is dedicated to protecting against and remedying deprivations of constitutionally protected rights. The Clinic regularly represents persons who bring civil rights claims against state and local government officials. Many of these claims involve both state and federal constitutional law issues. The application of traditional res judicata principles in Section 1983 actions would substantially restrict the availability of relief for those clients who first seek redress in the state courts.

SUMMARY OF ARGUMENT

Civil rights plaintiffs should be permitted to present state law claims to state courts and federal law claims under 42 U.S.C. §1983 to federal courts. Allowing plaintiffs this choice preserves the key federal purpose of §1983. That purpose is to insure that the federal courts will provide redress for violation of federal constitutional rights under color of state law. The Reconstruction era Congress that passed §1983 believed that neither state legislators nor state judges could be trusted to protect these rights. Mere filing of purely state law claims in state court should not override this purpose of §1983.

Since this Court's decision in England v. Board of Medical Examiners, 374 U.S. 411 (1963), plaintiffs have

been allowed to litigate their consitutional claims in federal court after litigating state claims in state court. Under England, and more recently under Allen v. McCurry, 449 U.S. 90 (1980), only relitigation of the same claim has been barred.

Dr. Migra seeks only to litigate constitutional claims she never raised in her successful state contract action. Allowing her to raise her federal claims now will not provide her with two opportunities to recover the same damages. Plaintiff is entitled to be compensated separately for violations of her constitutional rights.

Also, comity will be best served by allowing plaintiff to litigate her federal constitutional claim separately in federal court. This will leave state courts free to decide

questions of state law and statutory interpretation. Each court, thus, will be allowed to decide questions peculiar to the body of law over which it is most familiar.

However, to apply a res judicata bar to §1983 actions would have the opposite effect. Forced to choose between filing all their claims in either federal or state court, many §1983 plaintiffs would choose the federal forum. As a result, federal courts could become overwhelmed with state claims best decided in state court.

Dr. Migra also should be able to litigate her federal claim in federal court because state court dismissed her conspiracy count without prejudice. As a result, plaintiff had the right to refile that claim. Neither Ohio law nor this Court's

own construction of res judicata would bar plaintiff's current claim.

ARGUMENT

I. SECTION 1983 PROVIDES A CIVIL RIGHTS PLAINTIFF WITH THE RIGHT TO CHOOSE BETWEEN A FEDERAL AND A STATE FORUM TO PRESENT CONSTITUTIONAL CLAIMS.

A. The Purposes of §1983 Require That Dr. Migra Be Allowed To Bring Her Civil Rights Action In Federal Court.

A civil rights plaintiff should be allowed to bring federal civil rights claims before a federal court, so long as those claims have not first been litigated in a prior state proceeding. The purposes behind 42 U.S.C. §1983 require such a conclusion. At the same time, principles of comity and common sense argue against precluding civil rights litigants from taking their state claims into state court.

The primacy of the federal courts in adjudicating constitutional claims under §1983 cannot be disputed. Monroe v. Pape, 365 U.S. 167 (1961). Congress, by interposing the federal government as "guarantor of basic federal rights,"

> opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of this Nation.

Mitchum v. Foster, 407 U.S. 225, 229 (1972). The legislative history of §1983 similarly evinces clear congressional intent to "[alter] the relationship between the States and the Nation with respect to the protection of federally created rights." Id. at 242.

When a plaintiff chooses to pursue his state law claims in state court, he should be allowed to preserve

his right to present his federal constitutional claims in a federal court. The determination of state law claims should not act as res judicata to federal claims which were preserved for federal court and not presented or litigated in the state court. Any other result would violate the purposes of 42 U.S.C. §1983.

In Monroe v. Pape, Justice Douglas outlined three objectives of §1983. First, it provided a means of overriding certain state laws inimical to the Constitution. Second, a remedy would be provided when state law is inadequate. Third, §1983 would provide a federal remedy where the state remedy, though adequate in theory, is not available in practice. 365 U.S. at 173-74. Thus, the Court concluded that exhaustion of state

remedies was not required before bringing an action for damages under §1983 as "[t]he federal remedy is supplementary to the state remedy." Id. at 183. Last term in Patsy v. Board of Regents, ___U.S.___, 73 L.Ed 2d 172 (1982), this Court reaffirmed the determination in Monroe v. Pape, 365 U.S. 167 (1961) that civil rights plaintiffs need not exhaust state remedies before commencing §1983 actions.

Justice Harlan, concurring separately, in Monroe, additionally made clear the "supplementary" nature of the unique-ly federal relief provided by §1983:

> [A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.

Monroe v. Pape, 365 U.S. at 196 (emphasis added); Carey v. Piphus, 435 U.S. 247(1979).

B. This Court Has Previously Allowed Civil Rights Plaintiffs To Litigate Federal Claims in Federal Court After Having Litigated Their State Claims in State Court.

Twenty years ago, this Court held in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1963), that plaintiffs who litigated state law claims in state court could retain a right to bring a separate federal action to litigate issues of constitutional law. Similarly, Dr. Migra sought relief under Ohio law in the Ohio courts. She now seeks to vindicate her federal constitutional rights before a federal tribunal.

In England, the plaintiffs had been ordered into state court under the Pullman abstention doctrine. After the state court had decided the case, this Court refused to attach

preclusive effect to the judgment of the state court on an issue of federal constitutional law. In so ruling, this Court emphasized the fundamental importance of a plaintiff's "right to litigate his federal claims fully in the federal courts."[1/] Id. at 417.

England draws a "bright and clear" line by which only those constitutional claims which have been fully litigated in state court are barred from subsequent relitigation before a federal court:

[1/] This principle was most recently recognized in the concurring opinion of Justice Brennan in Fair Assessment in Real Estate Ass'n v. McNary, ___ U.S. ___, 102 S.Ct. 177 (1981), in which Justices Marshall, Stevens and O'Connor joined. There it was indicated that those challenging the constitutionality of state tax laws could be required to first exhaust state administrative remedies before beginning a federal action under §1983. It is assumed that prior resort to the state forum for relief would not be a bar to a federal action but would indeed be required.

> [W]e see no reason why a party, after unreservedly litigating claims although not required to do so, should be allowed to ignore the state decision and start all over again in the District Court.

Id. at 419.

This position was also recognized in Allen v. McCurry, 449 U.S. 90 (1980). There, this Court held that issues actually decided by state courts should not be litigated again in §1983 cases raised in federal court. Id. at 95.

Allowing Dr. Migra to pursue her §1983 claim in federal court is fully consistent with this Court's holding in Allen. There, the Court was concerned with relitigation of an issue already raised and decided against the petitioner in state court. By contrast, none of Dr. Migra's potential federal claims were decided and she won the state issues she presented in state court. Thus,

permitting consideration of her federal claims would raise none of the policy concerns against relitigation highlighted in either England or Allen.

Also, allowing Dr. Migra to raise her federal claims would not provide her with an opportunity for "two bites at the apple." At no time during a subsequent federal court proceeding would she be allowed to relitigate any aspect of her state contractual dispute. Indeed, had Dr. Migra raised any of her federal claims at the state level, and had those issues been decided by that court, collateral estoppel would bar her from raising those issues anew in federal court under §1983. Allen v. McCurry, 449 U.S. 90, 95, 104.

C. Comity Will Not Be Hindered By Federal Court Consideration of Civil Rights Claims Following State Court Consideration of Related State Law Claims.

Comity, too, can best be served by district court consideration of Dr. Migra's §1983 claim. Her federal complaint raises only issues of federal constitutional law, an area of obvious federal court expertise. Permitting Dr. Migra to raise her federal claim in federal court will leave questions of state law and statutory interpretation to the state court, again, the most expert forum. This is the very essence of comity: each court would be allowed to decide questions peculiar to the body of law over which it is most familiar.

Furthermore, permitting Dr. Migra to separate her state claims from those raised under §1983 is not foreclosed because of any special

or urgent need for finality. See, e.g., Castorr v. Brundage, 51 U.S.L.W. 3285 (Oct. 12, 1982)(Stevens, J., concurring in the denial of certiorari). There, the Court was asked to resolve a dispute over parental rights. At issue was the effect of a prior state court adjudication on the subsequent filing of a §1983 claim in federal district court.

Justice Stevens, agreeing with the Sixth Circuit, wrote that, because of the special facts of the case, the importance of finality was "compelling." Dr. Migra's case involves none of the "compelling" facts at issue in Castorr. First, that case involved child custody, an area going to the heart of the police power of the state and one not customarily heard by federal courts. Second, prolonged litigation, he warned,

could have "an adverse effect on the emotional and physical health of the child." 51 U.S.L.W. at 3285. In Dr. Migra's case, her rights under her employment contract with the Warren City School Board have been finally and effectively dealt with. Nor has Dr. Migra asked the federal courts to upset this finding. Whatever special interests the State of Ohio had in adjudicating contract claims between employees and governmental agencies, these interests have been met.

As a general policy concern, the application of res judicata to §1983 will dramatically increase the caseload of the federal district court. Forced to choose between an exclusively federal or state forum, many §1983 litigants will file as a matter of course in the federal

court in order to preserve the availability of that forum.[2/] As a result, the federal courts will be overwhelmed by the unnecessary task of having to sort through related state claims best litigated in the state courts.

In addition, such a decision will greatly diminish the possibility of resolving potential federal constitutional claims without recourse to the federal courts. As a matter of jurisprudence, this Court has historically recognized that constitu-

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2/ In Kremer v. Chemical Construction Corp., ___ U.S. ___, 50 U.S.L.W. 4487 (Oct. 12, 1982), this Court held that res judicata must apply under 28 U.S.C. ¢1738 to Title VII actions brought in federal court. Even in the year since then, counsel for amicus, who specializes in employment discrimination cases in Illinois, has found that he and other attorneys are abandoning employment discrimination claims after adjudication by Illinois' human rights agencies. Then, they are commencing Title VII actions rather than allowing their claims to reach state court.

tional questions should not be passed upon if there is "any other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

In their opinions in Patsy v. Board of Regents, Justices O'Connor and Powell both recognized the important practical effect of mooting potential federal claims through the use of state administrative remedies. 73 L.Ed.2d at 188 (O'Connor, J., concurring); 198 (Powell, J., dissenting). Both Justices agreed that, by leaving the way clear for resolution of potential federal claims at the state level, state administrative procedures would help relieve an already overburdened federal case-

load

At its worst, application of res judicata to §1983 claims would leave the federal courts in the anomolous position of deciding state law claims. This outcome is clearly inimical to the principles of comity established by this Court.

A finding that res judicata applies in this instance would produce the ludicrous result that plaintiffs would file useless federal court actions only to have the court abstain under the Pullman doctrine and remit them to state courts to have state claims decided. Such an obviously inefficient procedure would land the plaintiff in the identical position as that now maintained by Dr. Migra, but only at a tremendous cost to the district court in terms of time and human resources.

A needless procedural run-around such as this was rejected in Board of Regents v. Tomanio, 446 U.S. 478 (1979)(Stevens, J., concurring). There, Justice Stevens persuasively argued that a plaintiff should not be required to file simulataneously in both federal and state court simply in order to avoid a time bar under a federal statute of limitations. Such an exercise, he wrote, "make[s] no sense to me in terms of either federalism or judicial administration." Id. at 493.

D. Because Dr. Migra Has Litigated Only Her State Law Claims She Should Not Be Barred From Now Litigating Her §1983 Claims in Federal Court.

Since Dr. Migra litigated only her contract claim in state court her federal civil rights claim should not now be barred. Plaintiff original-

ly sued the Warren City District School Board and three of its members in the Ohio Court of Common Pleas under a common law claim of conspiracy as well as under a breach-of-contract claim. At the beginning of the trial the judge, sua sponte, "reserved and continued" plaintiff's conspiracy count. Several weeks after the trial, the state judge dismissed that claim without prejudice.

In Ohio, a dismissal without prejudice has no res judicata effect. Chadwick v. Barbae Lou, Inc., 69 Ohio St.2d 222 (1982). Therefore, plaintiff was free under Ohio law to refile her conspiracy claim.

Instead, Dr. Migra filed a new action in federal district court under §§1983 and 1985. She alleged that defendants reacted with "fierce hostility" to her work as the head

of a teachers committee which was formulating a controversial social studies curriculum and her work as director of a commission planning desegregation of the Warren City schools. As a result of this hostility, defendants spread false and malicious rumors about plaintiff's private life and they breached plaintiff's contract of employment. All this was done, plaintiff contended, "pursuant to a pre-conceived plan to eliminate the plaintiff as the Supervisor of Elementary Education for the Warren City School District." (Plaintiff's U.S. District Court complaint, pp. 3-5).

Since plaintiff would not have been barred by res judicata from seeking redress in Ohio courts under her conspiracy claim, she should be free to pursue this claim in federal court.

Furthermore, under this Court's own definition of res judicata, plaintiff would not be barred. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Kremer v. Chemical Construction Corp., ___U.S.___, 50 U.S.L.W. 4487, 4489 n.6. (May 18, 1982). Since the state judge refused to hear plaintiff's conspiracy claim, this matter neither was litigated nor could it have been litigated.

Allowing Dr. Migra to pursue her claim is also consistent with this Court's reasoning in Kremer. There, the Court held that a person who fully litigated, and lost, an employment discrimination action in the agencies and courts of New

York could not litigate his claim under Title VII in federal court. Writing for the Court, Justice White noted that the elements of Kremer's cause of action under Title VII were "virtually identical" to the elements of his cause of action under New York's employment discrimination law. Thus, he concluded, the state court's decision against Kremer "also decided that a Title VII claim arising from the same events would be equally meritless." Id. at 4492.

In this case, unlike Kremer, the elements of plaintiff's state claim are not the same as the elements of her federal cause of action. To win her contract dispute in state court, Dr. Migra only had to show that the school board made a valid offer which she accepted before its recission. But technical issues

of offer and acceptance as applied to municipalities in Ohio have little in common with the elements of plaintiffs' claims under §1983 and §1985.

Also, unlike Kremer, Dr. Migra won her prior state court action. The finding that the school board breached her contract buttresses, rather than defeats, plaintiff's case. Therefore, unlike the situation in Kremer, a federal court finding in favor of plaintiff would in no way clash with the state court decision.

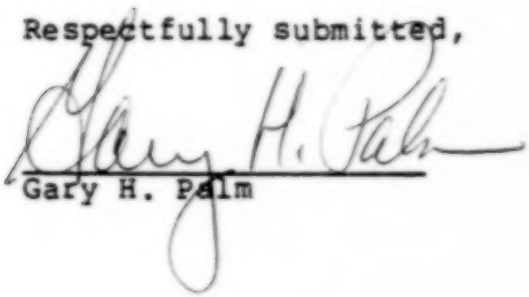
However, Dr. Migra has not been compensated for the violation of her constitutional rights and the defamation she suffered as a result of defendants' conduct. Even if she could show no other actual injuries, she would be entitled to damages for violation of her constitutional

rights. Carey v. Piphus, 435 U.S. 247 (1978).

CONCLUSION

For the aforementioned reasons the judgment below should be reversed.

Respectfully submitted,



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No. 82-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL MIGRA,

Petitioner,

v.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE STATE OF MARYLAND AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the doctrine of *res judicata* applies to Section 1983 claims in federal court which could have been but were not raised by a plaintiff in his prior state court action.

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BRIEF AMICI CURIAE OF THE STATE OF MARYLAND AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The State of Maryland is continually involved in state and federal court litigation brought against it involving common law and statutory claims and claims pursuant to Title 42 U.S.C. § 1983. In many of these cases the plaintiff could characterize his cause of action either as a common law/statutory violation or as a Section 1983 constitutional violation. Since this case concerns the application of *res judicata* to Section 1983 actions brought in federal court subsequent to a judgment in state court in which the same claim could have been litigated, the State has a significant interest in the Court's disposition of this issue.

In addition, the State of Maryland has a particular interest in the dispostion of this case as it has recently argued a similar issue before the United States Court of Appeals for the Fourth Circuit in *Kutzik v. Young, et al.*, No. 82-1264. The Fourth Circuit has withheld ruling on the issue pending the Court's decision in this case.

The American Council on Education is a voluntary membership organization composed of 1,355 non-profit institutions of higher education from both the public and private sectors and 178 educational associations.

SUMMARY OF ARGUMENT

There is nothing in the language of Section 1983, its legislative history, or in this Court's prior decisions to justify an exception to the doctrine of *res judicata* for a Section 1983 claim in federal court which could have been, but was not raised in a prior state court action. *See Allen v. McCurry*, 449 U.S. 90 (1980).

Moreover, application of the doctrine of *res judicata* serves several extremely important policies: conservation of judicial resources, preservation of the validity of prior judgments, fostering of respect for state courts, and avoidance of harassment of defendants. These policies would be undermined if an exception to the ordinary application of *res judicata* were created in this case. Parties would be encouraged to limit suits in state court to purely state claims in order to get a second "bite of the cherry" in federal court, should they not be *totally* satisfied with the state court result. This would result in piecemeal litigation rather than a consolidation of claims, a waste of judicial resources, increased time and expense to all parties, and a lack of certainty and finality to all litigation involving potential Section 1983 defendants. On the other hand, application of the doctrine of *res judicata* in this case would encourage judicial economy without in any way sacrificing individual rights.

ARGUMENT

Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action. *Cromwell v. County of Sac*, 94 U.S. 351 (1877) cited in *Allen v. McCurry*, 449 U.S. 90 (1980). *Res judicata* "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). The doctrine "reflects the refusal of law to tolerate needless litigation." *Angel v. Bullington*, 330 U.S. 183, 192-193 (1947).[1] Subsequent litigation is needless if, by fair process, a party over whom the court had jurisdiction had *an opportunity* to raise issues that were a part of the cause of action previously dealt with. *Angel v. Bullington, supra; Heiser v. Woodruff, supra.*

Although Petitioner and the *amici* admit that traditional principles of collateral estoppel apply fully to litigants in Section 1983 actions, they argue that traditional principles of *res judicata* should not apply to such litigants. This argument is made even though this Court has recognized collateral estoppel and *res judicata* are related doctrines based on essentially identical policy considerations:

> Indeed, from *Cromwell v. County of Sac*, 94 U.S. 351 (1877), to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) this Court has consistently emphasized the importance of *the related doctrines of*

[1] State court judgments traditionally have been accorded full preclusive effect in federal suits initiated under the general federal question statute, 28 U.S.C. § 1331 (1976). *Angel v. Bullington, supra; Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930).

> *res judicata and collateral estoppel* in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. (emphasis added).

Kremer v. Chemical Construction Corporation, ___ U.S. ___, 102 S. Ct. 1883 at 1889-90 n. 6 (1982). Accordingly, the position maintained by the Petitioner and *amici* herein, is unsupportable on legal or public policy grounds.

First, there is no justification for an exception to the traditional principles of *res judicata* based on the wording of the statute or on the legislative history of Section 1983. As this Court noted in *Allen v. McCurry*, 449 U.S. 90 (1980):

> . . . nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . . Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.
>
> Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion . . . [I]n the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and *res judicata*. Since repeals by implication are disfavored, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

449 U.S. at 97-99. (footnotes omitted).

This holding was reaffirmed by this Court last year in *Kremer v. Chemical Construction Corporation*, ___ U.S. ___, 102 S. Ct. 1883 (1982).[2]

Second, there is no basis for an assertion that state courts cannot competently and fairly decide constitutional issues. The debates accompanying the Section 1983 legislation indicate that Congress was well aware of the extreme times in which it was acting and anticipated that the states, consistent with the constitutional scheme, would resume administration of federal civil rights law in their own courts. *Allen v. McCurry, supra* at 100 n. 16. Present circumstances provide no reason to doubt that state courts are capable of acting in accordance with federal principles. According to this Court, state and federal courts are equally competent to decide federal claims even when those claims concern objections to official state action. As noted by this Court in *Stone v. Powell*, 428 U.S. 465, 493-494 n. 35 (1976):

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states.

[2] Furthermore, it appears from a footnote in *Kremer* that this Court deemed *res judicata* to preclude relitigation of an issue which the plaintiff *could* have raised in the prior state proceedings. Kremer had alleged national origin discrimination before the EEOC and in his Title VII suit, but failed to raise this allegation in his prior complaint filed with the state. After noting that Kremer did not argue that his national origin claim was different from his state claim of religious discrimination, this Court stated:

> Of course, if Kremer desired to make such a claim, he was obligated to first bring it before the NYHRD. Moreover, "[a] party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding."

102 S. Ct. at 1889 n. 4 (citations omitted).

And in *Allen v. McCurry, supra*, distrust of a state forum was dismissed as a possible justification for refusal to apply the doctrine of collateral estoppel because of this Court's faith in state forums.

Third, Section 1983 guarantees only the *choice* of a federal forum for constitutional challenges. "Choice of forum" means the initial election between forums that a litigant makes when he decides to sue, not access to a federal forum *after* the case has been litigated in state court. *Allen v. McCurry, supra* at 103-105 (1980). Of course, if a plaintiff brings his action in federal court he may do so without waiving the right to present his state based claims — the federal court can give pendent jurisdiction to the state claim.[3] Similarly, if a plaintiff chooses to proceed in state court with his cause of action, he may litigate his Section 1983 claim as well. *Maine v. Thiboutot* 448 U.S. 1 (1980).[4] However, once having choosen his forum — either state or federal — a claimant should not be permitted to later relitigate another portion of his claim in a different forum, just because he is dissatisfied with the first result.

Fourth, and perhaps most important, the public policies which underpin the doctrine of *res judicata* support its application in this case. Those policies are conservation of judicial resources, preservation of the validity of prior judgments, fostering of respect for the rendering state

[3] The rationales for *res judicata* also support the doctrine of pendent jurisdiction. It permits parties to resolve state and federal claims arising from the same factual situation in a single forum, thereby reducing litigation costs and the possibility of inconsistent judgments. In fact, if a plaintiff omits a related state claim from his initial federal suit and later asserts it in state court, the *Restatement* (second) of Judgments § 87(a)(1) requires that if the state court determines that the federal court would have exercised its pendent jurisdiction and heard the claim, *res judicata* bars the plaintiff in the second action.

[4] Of course, relitigation is always available if a Section 1983 plaintiff was not afforded a "full and fair opportunity" to try his claim in the state court. *Allen v. McCurry, supra.*

court, and avoidance of inconvenience to and harassment of defendants by piecemeal litigation. *See State of Montana v. United States* 440 U.S. 147 (1979); *Younger v. Harris* 401 U.S. 37 (1971). If the Court were to find in favor of Petitioner, the effect would be to encourage multiple law suits in state and federal court arising out of the same cause of action. Many common law claims may be described alternatively as constitutional violations. *See Bennun v. Board of Governors of Rutgers,* 413 F. Supp. 1274 (D.N.J. 1976) (denial of tenure challenged in state court as negligence and malicious interference, and in federal court as denial of due process and national origin discrimination); *Davis v. Towe,* 379 F. Supp. 436 (E.D. Va. 1974), affirmed, 526 F.2d 588 (4th Cir. 1975) (action in state court for false arrest and false imprisonment, and in federal court for deprivation of constitutional rights protected by the Fourth and Sixth Amendments); *Howe v. Brouse,* 422 F.2d 347 (8th Cir. 1970) (action against judge in state court for improper conduct brought in federal court as a violation of civil rights); *Spence v. Latting,* 512 F.2d 93 (10th Cir. 1975) (dismissal from employment without a hearing challenged in state court as violation of state statute and in federal court as a denial of due process).

Multiple litigation of the same cause of action would be encouraged in virtually every case. A plaintiff who was unsuccessful in state court on his common law claims would know that a "second bite at the cherry" was available in federal court.[5] Further, as this pending case

[5] This is precisely the situation pending before the United States Court of Appeals for the Fourth Circuit, in *Kutzik v. Young, et al.* No. 82-1264. Plaintiff, therein, initially filed a claim in state court against state officials alleging that the termination of his employment was in breach of contract. Losing in state court, plaintiff thereupon filed a suit in federal court, pursuant to 42 U.S.C. § 1983, alleging that the termination of his employment was in violation of his due process, equal protection and First Amendment rights. Clearly, plaintiff's federal claim embraces the same facts as his state claim and as such should be barred.

amply demonstrates, even a plaintiff who prevailed in state court might well renew his litigation in federal court in an attempt to get a greater monetary award or broader injunctive relief. In fact, a plaintiff would be likely to file suit simultaneously in state and federal court knowing that an adverse judgment in state court would not bar the federal claim. This would result in piecemeal litigation rather than a consolidation of all claims, a waste of judicial resources, increased time and expense to all parties, and a lack of certainty and finality to all litigation involving potential Section 1983 defendants. The role of *res judicata* should not be diminished because a plaintiff alleges a violation of his constitutional rights in federal court; "state courts, too are the guardians of the federal constitution." *Lovely v. Laliberte*, 498 F.2d, 1261, 1263 (1st Cir. 1974).

To eliminate abuse and inefficiency, the federal courts should apply the doctrine of *res judicata* to Section 1983 claims which could have been raised when a plaintiff filed his state court action. It is clearly desirable as a matter of policy that litigants with civil rights claims be afforded *one*, and only one, full and fair proceeding in which to vindicate their rights. Application of this doctrine encourages judicial economy without sacrificing individual rights.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

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QUESTION PRESENTED

Is a plaintiff in a federal court action brought under 42 U.S.C. § 1983 precluded from litigating an issue that he might have, but in fact did not, raise in a previous state court action?

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WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

The National Education Association ("NEA") files this brief *amicus curiae* with the consent of the parties.

INTEREST OF AMICUS CURIAE

NEA is a nation-wide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public school districts, colleges and universities throughout the United States. One of the principal purposes of NEA is to protect the legal rights of its members through, among other means, litigation in federal and state courts. This case presents an important question *vis-a-vis* the relationship between these two forums, and NEA has a substantial interest in its outcome.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court concluded that in enacting 42 U.S.C. § 1983, Congress did not "intend[] to allow relitigation [in § 1983 actions] of federal issues decided after a full and fair hearing in a state court." *Id.* at 101. The instant case presents a question that this Court expressly left open in *Allen*: "whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation." *Id.* at 94 n.5; *see id.* at 97 n.10.[1] As we demonstrate in the Argument section of this Brief, prior pronouncements of this Court (Section 1), the underlying purposes of 42 U.S.C. § 1983 (Section 2), and considerations of sound judicial administration (Section 3), all point to an affirmative answer.

ARGUMENT

This case had its genesis in a decision by respondent Board of Education to terminate the employment of petitioner. In petitioner's view, this action constituted both a breach of contract under Ohio state law and a violation of her rights under the First and Fourteenth Amendments to the United States Constitution. In an effort to deal with the matter without reaching the federal constitutional issues, petitioner filed an action in state court asserting only her state-law claims. On the basis of these

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[1] The courts of appeals are divided on the issue: three circuits have held that a litigant may raise § 1983 claims in federal court that were not raised before and resolved by a state court, *see Bickham v. Lashof*, 620 F.2d 1238, 1246 (7th Cir. 1980); *New Jersey Education Ass'n v. Burke*, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); *Lombard v. Bd. of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975), while a number of other circuits have reached a contrary conclusion, *see* cases cited in *Castorr v. Brundage*, 51 U.S.L.W. 3285 (Nov. 12, 1982) (White, J., dissenting from denial of certiorari.)

state-law claims, the state court found for petitioner, and granted her certain relief.

Petitioner considered the relief granted to her by the state court inadequate and, accordingly, filed a § 1983 action in federal court.[2] In this action, she relied on her federal constitutional claims,[3] asserting, *inter alia*, that the Board's decision to terminate her employment was based on the fact that she had exercised certain First Amendment rights.[4] The district court dismissed the action and the Court of Appeals for the Sixth Circuit affirmed. Although acknowledging that petitioner's § 1983 claims were neither raised nor decided in the previous state court action, the lower courts held that traditional state-law *res judicata* rules nonetheless precluded litiga-

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[2] Before the § 1983 action was filed, petitioner had been ordered reinstated by the state court and the respondent thereafter had terminated her employment for a second time. In her federal court complaint petitioner alleged that both terminations violated her constitutional rights. Only the constitutional violations alleged in connection with the first termination are presently relevant, however, as petitioner was precluded from litigating only these claims in her § 1983 action. (The district court dismissed petitioner's § 1983 claims relating to her 1980 termination on the merits and those claims are not before this Court.)

[3] Petitioner's federal court action was "in no way 'designed to annul the result of [the] state [judgment].'" *Wooley v. Maynard*, 430 U.S. 705, 711 (1977). Different considerations are involved when a § 1983 action does represent a collateral attack on a state court judgment, and the analysis set forth herein is not directed to that situation.

[4] Petitioner's § 1983 claim, which for present purposes must be taken as true, is that her employment was terminated for, among other things, protected activities involving desegregation of the district's schools and development of the district's social studies curriculum. Petitioner also alleged that the respondents violated her Fourteenth Amendment right to due process.

tion of these claims *to the extent that they could have been litigated in the state court action.*[5]

What this holding means is that persons in petitioner's situation may not obtain both a state court adjudication as to the merits of their state-law claims and a federal court adjudication as to the merits of their federal constitutional claims; in order to obtain an adjudication as to the merits of all their claims, such persons must bring their state-law claims in federal court or their federal constitutional claims in state court. As we now demonstrate, 28 U.S.C. § 1738 does not require this result.[6]

1. The reasoning of this Court in *Atlantic Coast Line R. R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) indicates that 28 U.S.C. § 1738 should not be interpreted to produce the result reached by the courts below. That case arose out of picketing by the respondent Brotherhood against the petitioner Railroad. The Railroad initially sought a federal district court injunction against the picketing, but the injunction was denied. The Rail-

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[5] These *res judicata* rules are made generally applicable by 28 U.S.C. § 1738, which provides in relevant part:

> The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as They have by law or usage in the courts of such State. . . .

[6] Although for purposes of argument, we assume that Ohio's *res judicata* rules would bar petitioner from litigating her federal constitutional claims in a second state court action, this may not in fact be the case. *See* Petitioner's Brief.

In addition to the situation presented in the instant case, the question left open in *Allen v. McCurry* also could arise if a putative plaintiff in a § 1983 action sought to assert a federal constitutional claim which could have been raised as a defense to, or a counterclaim in, a previous state court action in which he had been a defendant. In the latter situation, the application of traditional *res judicata* rules to bar unlitigated federal claims would deprive the putative plaintiff of a choice of forum. *Compare, England v. Louisiana State Board*, 375 U.S. 411 (1964).

road then went to state court, and an injunction was issued based upon violations of state law. At the request of the Brotherhood, the federal district court enjoined enforcement of the state court injunction. This Court reversed, concluding that the federal court injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, inasmuch as it was not "necessary in aid of" federal court jurisdiction. The Court explained:

> While the railroad could probably have based its federal case on pendent state law claims as well, it was free to refrain from doing so and leave the state law questions . . . to the state courts. *Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone.* In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts. Therefore, the state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction necessary to aid that jurisdiction.

Id. at 295-96 (citations omitted) (emphasis added).

Although, strictly speaking, *Atlantic Coast Line R. R.* did not involve an application of *res judicata* rules pursuant to 28 U.S.C. § 1738, the underscored statement constitutes an explicit and unequivocal endorsement of the construction of that section that we urge in the instant case: permitting a federal court to entertain a § 1983 action raising federal constitutional claims that could have been, but in fact were not, raised or decided in a previous state court action involving only state-law claims.

When viewed against the backdrop of our federal system, there can be little question but that the interpretation of § 1738 suggested by *Atlantic Coast Line R. R.* is proper. "[F]rom the beginning we have had in this country two essentially separate legal systems," each of

which "proceeds independently of the other." *Atlantic Coast Line R. R., supra*, 398 U.S. at 286. In this setting, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). The lower court's appliction of 28 U.S.C. § 1738—which would require a plaintiff who desires a federal forum for his federal constitutional claims to bring his state-law claims in federal court, and would penalize a plaintiff for bringing his state-law claims in state court instead—scarcely complies with the latter mandate. In contrast, the approach taken in *Atlantic Coast Lines R. R.*—which allows separate state and federal actions raising state and federal claims (but applies collateral estoppel to prevent relitigation of already-litigated issues in such actions)—which avoid needless "interfer[ence] with the legitimate activities of the States." It thus represents a reasonable accommodation to the necessities of the federal system.[7]

2. The choice that the decision below puts before a putative plaintiff is, moreover, incompatible with the underlying purposes of § 1983. In enacting § 1983 "Congress assigned to the federal courts a paramount role in protecting constitutional rights," *Patsy v. Board of Regents*, 102 S.Ct. 2557, 2561 (1982), "offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as

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[7] As the Third Circuit observed in adopting this approach:

> Such a rule avoids the tendency of the 'could-have-litigated' test to discourage the use of state forums to determine matters of state law while at the same time giving due regard to matters actually decided by state tribunals. *New Jersey Education Ass'n v. Burke*, 579 F.2d 764, 774 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978).

guardians of the people's federal rights, to protect the people from unconstitutional action under color of state law . . . ." *Id.* at 242. *See also Steffel v. Thompson*, 415 U.S. 452 (1974).

Congress realized, when it enacted § 1983, that—as this case illustrates—conduct violative of the federal constitution, and hence actionable under § 1983, is often actionable under state law as well. "It is abundantly clear that one reason [§ 1983] was passed was . . . because, by reason of prejudice, passion, intolerance or otherwise, *state laws* might not be enforced." *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (emphasis added). This concern, as well as the "grave congressional concern that the state courts had been deficient in protecting *federal* rights," *Allen v. McCurry*, *supra*, 449 U.S. at 98-99 (emphasis added), led Congress to create a "federal remedy [which] is supplementary to the state remedy," *Monroe v. Pape*, *supra*, 365 U.S. at 183.

In light of the congressional skepticism of state courts that led to the enactment of § 1983, it would be anomalous indeed to hold that a plaintiff who wishes to present a state-law claim to state court—presumably because it is expert in state-law matters—is required to present his § 1983 claims to the state court as well. And the alternative that the decision below offers to a § 1983 claimant —he may invoke his § 1983 rights in a federal forum, but he then will be precluded from asserting his state-law claims in state court—is equally unpalatable. The net effect would be to channel state-law claims away from the state courts, which would "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, *supra*, 401 U.S. at 44.

It is, in short, virtually unthinkable that the Congress that enacted § 1983 intended either to force federal constitutional claims into the (then-suspect) state courts or to interfere with the state court's freedom to hear state-law claims if the facts also implicate federal con-

stitutional rights.[8] Thus, there is especially strong reason, in the § 1983 context, to construe 28 U.S.C. § 1738 as allowing plaintiffs to proceed in state court with state-law claims and in federal court with § 1983 claims (subject, of course, to the application of collateral estoppel in either proceeding with respect to issues actually litigated in the other).[9]

3. Finally, practical considerations relating to the efficacious functioning of the federal courts also militate strongly against the holding below. The experience of NEA and its affiliates indicates that, if forced by *res judicata* rules to make an either/or choice between a state and federal forum for their combined state-law and federal constitutional claims, civil-rights plaintiffs would tend to choose the latter, invoking the federal court's pendent jurisdiction with respect to their state-law claims.[10] Thus,

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[8] The narrow definition of "cause of action" that existed when § 1983 was enacted makes it even more unlikely that Congress intended the result dictated by the lower courts' decision. Indeed, under the *res judicata* rules in 1871, a plaintiff may well have been permitted to bring his breach of contract and constitutional cliams in separate state court actions. *See Allen v. McCurry, supra*, 449 U.S. at 114 & n.16 & sources cited (Blackmun, J., dissenting).

[9] Even if, contrary to the reasoning of *Atlantic Coast Line R. R., supra*, § 1738 generally precludes a plaintiff from litigating a federal claim that might have been but was not raised in a previous state court action, the § 1983 legislative history reviewed in text indicates that at the very least Congress impliedly intended, in enacting § 1983, to create a narrow exception to this rule so as to permit a plaintiff to bring to federal court § 1983 claims which were not litigated in state court.

[10] In *Allen v. McCurry, supra*, 449 U.S. at 194 n.23, this Court concluded that there was little likelihood that application of *res judicata* to bar relitigation of issues raised in defense to a state court criminal prosecution would result in further burdening of the federal courts, as "it is difficult to imagine a defendant risking conviction and imprisonment because he hoped to win a later civil judgment based upon an allegedly illegal search and seizure." Here, in contrast, it is not at all "difficult to imagine" a

the likely result of the rule announced by the courts below will be to bring to an already-burdened federal court system a host of state-law claims which more appropriately are, and otherwise would be, resolved in state courts. And in any § 1983 action in which a decision in plaintiff's favor on the state-law claims would make it unnecessary to reach the federal constitutional issues, the federal court would be required to rule initially on the state-law claims. *E.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Ashwander v. TVA*, 297 U.S. 288 (1936); *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 (1944).

To be sure, there are certain steps that the federal courts could take to avoid deciding the state-law claims, but the net effect of these steps would be to bring about—after the expenditure of precious federal judicial resources—precisely the result that could be achieved by construing § 1738 in the manner that we urge in this case. For example, a federal court could abstain from deciding the state-law claims under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); if it did so, the plaintiff then would be free to pursue his state-law claims in state court without being barred by *res judicata* from subsequently pursuing § 1983 claims in federal court. *See England v. Louisiana State Board, supra.*[11] Alternatively, a federal court could avoid deciding the state-law claims by re-

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plaintiff foregoing asserting state claims in state court in order to preserve his right to a federal forum.

Of course, some plaintiffs, even if permitted to bring separate state and federal court actions, will choose to consolidate all their claims in one action. Whatever the decision in this case, it will not affect such plaintiffs. Our concern here is with those plaintiffs, like petitioner, who would prefer a state court decision on their state-law claims and a federal court decision on their § 1983 claims.

[11] *England* impliedly creates an exception to traditional *res judicata* rules and allows a federal court, which has abstained on a state-law claim and remitted plaintiff to state court, to decide "reserved" federal claims after the state court proceeding has been concluded, regardless of whether state *res judicata* law would treat the "reserved" federal claims as barred.

fusing to exercise pendent jurisdiction over them, *see Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (although because, by definition, the state and federal claims will be sufficiently related that the omission of one ordinarily would bar litigation of the other, the exercise of pendent jurisdiction generally would be appropriate); if the court declined jurisdiction over the state claims, the plaintiff would, of course, be free to pursue them in state court. Thus, either an abstention decision or a decision not to exercise pendent jurisdiction would bring about a result —separate litigation of the state-law and federal constitutional claims—that could be achieved without requiring the expenditure of federal judicial resources, simply by allowing the plaintiff to proceed *ab initio* in state and federal court with his state and federal claims.

In sum, the interests of sound judicial administration would not be served if 28 U.S.C. § 1738 were applied to preclude a plaintiff from litigating his state-law and § 1983 claims in separate forums. To the contrary, this would force federal courts to decide a host of state-law issues which are better adjudicated by state courts or, alternatively, would require federal courts to expend their resources to authorize "claim splitting" of precisely the type that would be achieved by permitting separate state and federal actions.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Counsel for petitioner: Vintilla, John R.

Counsel for respondent: Burkholder, John C., Messenger, James L.

Entry	Date	Note	Proceedings and Orders
1	Oct 19 1982	G	Petition for writ of certiorari filed.
2	Nov 24 1982		Brief of respondents Catherine O. Swan, et al. in opposition filed.
3	Dec 1 1982		DISTRIBUTED. January 7, 1983
4	Jan 10 1983		Petition GRANTED.
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5	Feb 22 1983		Brief of petitioner Ethel D. Migra filed.
6	Feb 22 1983		Joint appendix filed.
7	Feb 24 1983		Brief amicus curiae of National Education Assn. filed.
8	Feb 28 1983		Brief amicus curiae of A.C.L.U., et al. filed.
9	Feb 28 1983		Brief amicus curiae of Edwin F. Mandel Legal Aid Clinic filed.
10	Mar 5 1983		Record filed.
11	Mar 5 1983		Certified original record & C.A. proceedings received.
13	Mar 21 1983		Order extending time to file brief of respondent on the merits until April 7, 1983.
14	Mar 30 1983		Brief of respondents Catherine O. Swan, et al. filed.
15	Apr 7 1983		Brief amicus curiae of State of Maryland, et al. filed.
16	Jul 8 1983		CIRCULATED.
17	Aug 15 1983		SET FOR ARGUMENT. Tuesday, October 11, 1983. (1st case)
18	Aug 19 1983	X	Reply brief of petitioner Ethel D. Migra filed.
19	Sep 29 1983	X	Supplemental brief of respondents Warren City Sch. Dist. Bd. Ed., et al. filed.
20	Oct 11 1983		ARGUED.